

1-1-1988

# Civil Practice

Jay C. Carlisle

*Elisabeth Haub School of Law at Pace University, [jcarlisle@law.pace.edu](mailto:jcarlisle@law.pace.edu)*

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## CIVIL PRACTICE

Jay C. Carlisle\*

### DEDICATION

*The 1988 Survey Article on New York Civil Practice is dedicated to former supreme court justice Joseph F. Gagliardi, who retired on December 31, 1987, as the Administrative Judge for the Ninth Judicial District.*

*In his celebrated biography of Lord Carson, Marjonibanks wrote: "A great lawyer's fame is always written in sand, and he leaves behind him no permanent memorial . . . ." Justice Gagliardi's fame is not written in sand. He has left many opinions and a legacy as one who many believe was New York State's most outstanding administrative judge. The opinions are too numerous to highlight, let alone to mention; however each was presented in lucid prose which is at once persuasive and pleasurable to read. His legacy is the respect and affection he earned from the bench and bar for his extraordinary administrative accomplishments and for his dedication to each task no matter how mundane.*

*Justice Gagliardi has also been extraordinarily supportive of the Pace Law School since its founding in 1976. He has been a loyal booster and an advisor and confidant to three deans—thus far—as well as numerous faculty members. Justice Gagliardi conceived and developed the Law School's successful judicial internship program and has been instrumental in the placement of Pace Law School graduates. He has been a guest lecturer at the Law School's continuing legal education programs and has been a frequent VIP at many of the School's receptions for distinguished dignitaries. Justice Gagliardi's excellence on the bench and personal characteristics of fair play and leadership,*

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\* Professor of Law, Pace University School of Law. J.D., University of California at Davis; A.B., University of California at Los Angeles. Professor Carlisle is the annotation author for the 1987 Supplement to the Weinstein, Korn & Miller treatise on New York Civil Practice. The author wishes to express his sincere thanks to Professor Richard T. Farrell of the Brooklyn Law School, Dr. Josephine Y. King of the Pace Law School, and Associate Justice Issac Rubin of the Second Department for their encouragement, and to John Mulligan for his research assistance. The author is also grateful to Gloria Pagonico for typing this article. Ms. Pagonico's patience and willingness to work overtime to produce this piece is appreciated more than she can ever imagine.

*tempered by a wonderful sense of humor, have earned the deep respect of students, faculty, deans and alumni of the Pace Law School. He is a complete gentleman whose exemplary behavior will serve as an inspiration to those fortunate to have known him.*

*Administrative Judge for the Ninth Judicial District Joseph F. Gagliardi, we will sorely miss you. Ad Multos Annos!*

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## I. INTRODUCTION

While 1986 was a watershed year for the CPLR practitioner,<sup>1</sup> 1987 passed with what one prominent commentator has referred "a yawn."<sup>2</sup> Nonetheless, there were several important amendments to the CPLR in 1987 and our courts produced more than a few

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1. See Carlisle, *Civil Practice, 1986 Survey of N.Y. Law*, 38 SYRACUSE L. REV. 67, 69-85 (1987) (discussing the many new 1986 amendments to the Civil Practice Law and Rules (hereinafter CPLR)).

2. Professor Richard T. Farrell of Brooklyn Law School, who was the Civil Practice Survey author for ten years, has advised the current author that 1987 "passed with a yawn."

"drab"<sup>3</sup> opinions worthy of discussion. Furthermore, the bar and bench should rejoice because this year's *Survey* marks the twenty-fifth anniversary of the CPLR<sup>4</sup> and the fiftieth anniversary of the Federal Rules of Civil Procedure.<sup>5</sup> It is also the sixty-fifth year since a commentator first reviewed significant developments in New York civil practice.<sup>6</sup>

## II. NEW LEGISLATION

Last year's *Survey*<sup>7</sup> highlighted significant changes in the

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3. See Rothschild, *New York Civil Practice Simplified*, 26 COLUMBIA L. REV. 30 (1926) (commenting on the practice decisions in 1925, Professor Rothschild states that they "present a drab picture indeed" and "follow each other in endless procession like so many khaki clad recruits stumbling along for lack of unified leadership.").

4. The Civil Practice Law and Rules (CPLR) were adopted at the 1962 legislative session and became effective on September 1, 1963. The CPLR replaced the Civil Practice Act (hereinafter CPA) which was enacted in 1921. The CPA had superseded the Code of Civil Procedure, known as the Throop Code which in turn had replaced the Field Code of 1848. The CPLR was the product of six years of work by the Advisory Committee on Practice and Procedure (Jackson A. Dykeman, Chairperson and Jack B. Weinstein, reporter) and two years work by the Codes Committee of the Senate (John H. Hughes, chairperson) and Assembly (Julius Volker, Chairperson) and by the Senate Finance Committee (Austin W. Erwin, Chairperson). The Advisory Committee on Practice and Procedure was established in 1955 by the Temporary Commission on the Courts (Harrison Tweed, Chairperson) after several public hearings had demonstrated a need and demand for a complete study and revision of the CPA. Research and drafting of the proposed provisions for the Advisory Committee was supervised by Professor Jack B. Weinstein of Columbia Law School, Professor Daniel H. Distler of Buffalo Law School and Professor Harvey L. Korn of Columbia Law School. Professor Louis R. Frumer of Syracuse Law School and Professor Louis Prashker of St. Johns University Law School also participated in the project. The relevant chapters enacted in 1962 are as follows: 308, 309, 310, 311, 237, 312, 313, 314, 315, 316, 317 and 318. Governor Rockefeller approved these acts establishing the CPLR in 1962 and they became effective on September 1, 1963.

5. Congress authorized the Supreme Court to promulgate general rules of civil procedure for the United States District Courts and Courts of Appeal by the Act of June 19, 1934, Ch. 651, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. 2072) (1982). The Court adopted the original rules on December 20, 1937 and the Attorney General forwarded them to Congress on January 3, 1938. The Federal Rules of Civil Procedure became effective on September 16, 1938. See 308 U.S. 645, 647-49 (1938).

6. The first *Survey* on New York Civil Practice was authored by Professor Jay Leo Rothschild of Brooklyn Law School and published in 23 COLUMBIA L. REV. 732 (1923). The current *Survey* has been published for the past twenty-five years by the *Syracuse Law Review* and prior thereto, since 1946, by the N.Y.U. Law Review. Prior *Survey* authors include Chief Judge Charles Desmond, Professor Herbert Pettifruend of N.Y.U., Former Dean Joseph McLaughlin of Fordham University Law School and Professor Richard T. Farrell of Brooklyn Law School.

7. See Carlisle, *Civil Practice, 1986 Survey of N.Y. Law*, 38 SYRACUSE L. REV. 67 (1987).

CPLR<sup>8</sup> and discussed the uniform court rules.<sup>9</sup> In 1987, there were fewer changes by the Legislature; however, modifications and additions to the uniform rules have been proposed.<sup>10</sup> Also, the Chief Administrative Judge of New York has proposed new rules relating to sanctions in civil matters,<sup>11</sup> and new rules are now effective in the Appellate Term for the Second Department.<sup>12</sup>

### A. *New CPLR Legislation*

Twenty of the seventy articles of the CPLR were amended in 1987.<sup>13</sup> The most important amendments are mentioned below.

#### 1. *CPLR 211: A New Twenty Year Limitations Period*<sup>14</sup>

Subdivision (e) of CPLR 211 was added by Ch. 815, Laws of 1987.<sup>15</sup> It establishes a twenty year period for any action or proceeding to enforce any judgment, temporary order or permanent order of any court that awards support, alimony or maintenance, regardless of whether or not arrears have been reduced to a money judgment.<sup>16</sup> The new subdivision applies only to orders entered after July 2, 1987.<sup>17</sup> Previously entered orders do not get the benefit of the twenty year period.<sup>18</sup>

#### 2. *CPLR 214(b): Agent Orange Statute*<sup>19</sup>

Chapter 194, Laws of 1987, effective June 29, 1987, extends the time within which Agent Orange actions must be brought to

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8. See *id.* at 69-85; see also *Civil Practice, 1986 Survey*, *supra* note 6, at 130-40.

9. See *id.* at 83-85.

10. See *infra* note 24 and accompanying text.

11. See *infra* note 28 and accompanying text.

12. See 198 N.Y.L.J., Jan. 21, 1987, at 1, col. 3.

13. The following sections of the CPLR were amended during the *Survey* year: 211(e), 214-b, 308(2) and (4), 312, 318, 321(a), 1101(a), 3012-a, 3045, 4546, 5205(c), 5231, 5241(c), 5242, 7804(i), 8011-a, 8012(d), 8018(a), and 8020(a). Each of the foregoing amendments became effective on or prior to January 1, 1988. The important amendments are highlighted in the *Survey*. In addition CPLR 8022, which is discussed in this *Survey*, was enacted and became effective November 5, 1987. See *infra* notes 14-21 and accompanying text.

14. See N.Y. CPLR 211 (McKinney Supp. 1988).

15. Act of Aug. 7, 1987 ch. 815, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 1470 (codified at N.Y. CPLR 211(e) (McKinney Supp. 1988)).

16. See N.Y. CPLR 211(e) (McKinney Supp. 1988).

17. See *id.*

18. See *id.*

19. See N.Y. CPLR 214(b) (McKinney Supp. 1988).

June 16, 1988.<sup>20</sup> This marks the fourth one-year extension of the Agent Orange tort revival law first enacted in 1981.

3. *CPLR 308(2)(4): "Leave and Mail" and "Nail and Mail"*<sup>21</sup>

Under CPLR 308(2),<sup>22</sup> as amended by Ch. 115, Laws of 1987, effective July 15, 1987,<sup>23</sup> it is permissible to mail a copy of the summons to the defendant by first class mail to his actual place of business.<sup>24</sup> This is an alternative to mailing a copy to the defendant at his last known address.<sup>25</sup> The mailing must be in an envelope bearing the words "personal and confidential."<sup>26</sup> The envelope may not indicate on the outside, by return address or otherwise, that it is from an attorney or that it relates to an action at law against the person served.<sup>27</sup> Chapter 115 of the Laws of 1987 made an identical amendment to CPLR 308(4)<sup>28</sup> which provides for personal service by "nail and mail."<sup>29</sup>

4. *CPLR 5231: Law of Income Execution In New York*<sup>30</sup>

Chapter 829, Laws of 1987, effective August 7, 1987, provides that no amount of income may be withheld from a debtor's earnings unless his "disposable earnings" exceeds thirty times the federal minimum hourly wage.<sup>31</sup> The income execution cannot exceed the amount by which a debtor's disposable earnings surpass that figure; nor can the execution exceed twenty-five percent of his disposable earnings.<sup>32</sup> Even as amended, CPLR 5231 provides that an

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20. See N.Y. CPLR 214(b) comment 1 (McKinney Supp. 1988).

21. See N.Y. CPLR 308(2) (McKinney 1972 & Supp. 1988).

22. See *id.*

23. Act of July 15, 1987, ch. 115, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 236-37 (codified at N.Y. CPLR 308(2) (McKinney Supp. 1987)).

24. See N.Y. CPLR 308(2) (McKinney 1972 & Supp. 1988).

25. See *id.*

26. See *id.*

27. See *id.*

28. Act of July 15, 1987, ch. 115, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 236-37 (codified at N.Y. CPLR 308(4) (McKinney Supp. 1988)).

29. See N.Y. CPLR 308(4) (McKinney 1972 & Supp. 1988).

30. See N.Y. CPLR 5231 (McKinney 1978 & Supp. 1988).

31. The current federal minimum hourly wage is \$3.35; therefore, the maximum amount that can be withheld is \$100.50.

32. See N.Y. CPLR 5231(c) (McKinney 1978 & Supp. 1988). The judgment debtor's disposable earnings are defined by new subdivision (c) of CPLR 5231 to include compensation payable for personal services (including pension payments) "after the deduction from



income execution may not exceed ten percent of a debtor's gross earnings.<sup>33</sup> CPLR 5231 also requires that an income execution delivered to a sheriff include a notice setting forth the statutory limits on the amount of the execution.<sup>34</sup> Additionally, the form of the notice is prescribed by subdivision (g) of CPLR 5231.<sup>35</sup> CPLR 5232(a) and (c) require that a copy of the execution be delivered by the sheriff to the garnishee and to the debtor.<sup>36</sup>

#### 5. CPLR 8022: New Section added entitled "Fee on Civil Appeal"<sup>37</sup>

Chapter 825, section 16 of the Laws of 1987,<sup>38</sup> which establishes a program to assist local governments in the financing and improvement of court facilities throughout the state, added a new section 8022 to article 80 of the CPLR.<sup>39</sup> The new provision, which became effective on November 5, 1987, imposes a fee of \$200.00 each time a civil record on appeal or statement in lieu of record is filed in the appellate division or the Court of Appeals.<sup>40</sup> Persons granted poor person relief are exempt from payment of the fee.<sup>41</sup> Additionally, because the statute only applies to civil appeals, the fee is not applicable to article 78 proceedings that are transferred to the appellate division pursuant to CPLR 7804(g) or in proceedings that originate in the appellate division.<sup>42</sup> At least one appel-

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those earnings of any amounts required by law to be withheld." When calculating disposable earnings, therefore, one has to exclude money withheld for taxes and social security as well as deductions made pursuant to orders of support of alimony or maintenance. *See id.*

33. *See* N.Y. CPLR 5231(g) (McKinney 1974 & Supp. 1988).

34. *See id.*

35. *See id.*

36. *See* N.Y. CPLR 5321(a)(c) (McKinney 1978 & Supp. 1988). The Legislature amended CPLR 5231 to conform it to federal law. In *Follette v. Vitanza*, 658 F. Supp. 492 (N.D.N.Y. 1987), the federal district court found that New York law authorized income executions in amounts which exceeded those permitted by the federal Consumer Credit Protection Act, 15 U.S.C. 1673 (1982). *See id.* at 512. The court also held that the debtors had a due process right to be notified of their federal rights. *See id.* at 513.

37. *See* N.Y. CPLR 8022 (McKinney Supp. 1988).

38. *See* Act of Nov. 5, 1987, ch. 825, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 1565-67 (codified at N.Y. CPLR 8022 (McKinney Supp. 1988)).

39. *See id.*

40. *See* N.Y. CPLR 8022 (McKinney Supp. 1988); *see also* Anderson, *Court Fees Rise Tomorrow For Filing of Civil Actions*, 198 N.Y.L.J., Nov. 4, 1987, at 1, col. 3.

41. *See id.*

42. *See* N.Y. CPLR 8022 (McKinney Supp. 1988); *see also* Newman, *Appellate Practice*, 198 N.Y.L.J., Nov. 19, 1987, at 1, col. 1 (full discussion of \$200.00 filing fee for both the

late division has indicated it does not plan to impose the fee in expedited election cases.<sup>43</sup>

Many other state court fees have increased as a result of chapter 825, Laws of 1987.<sup>44</sup> For example, the typical filing of a civil case in supreme court and county court has been increased by \$45.00.<sup>45</sup> In addition, the former \$35.00 fee to buy an index number is now \$100.00 but the \$70.00 fee for filing a note of issue to place the case on the trial calendar has been eliminated.<sup>46</sup> Moreover, a new \$50.00 charge has been added for the issuance of a request for judicial intervention.<sup>47</sup>

## 6. *Merger and Reorganization of the New York State Court System*

Most *Survey* articles do not mention legislative inaction. Nonetheless, the practitioner should be alerted to the failure of the Legislature to give second passage to the proposed constitutional amendment to provide for merger and reorganization of our state's court system.<sup>48</sup> The proposed merger of New York's trial courts was declared "dead" by Governor Cuomo in June and formally buried when the Legislature left Albany in July without voting on the issue.<sup>49</sup>

There are eleven different trial courts in New York State with separate judicial systems each dealing with different aspects of civil matters.<sup>50</sup> Some proceedings must be brought in more than one of these systems in order to achieve the desired end, and fre-

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Appellate Division of the State Supreme Court and the Court of Appeals).

43. See Newman, *supra* note 42 (referring to the Appellate Division for the Second Department).

44. See *supra* note 38 and accompanying text.

45. See N.Y. CPLR 8022 (McKinney Supp. 1988).

46. See *id.*

47. See *id.*

48. See Kaufman, 44th Street Notes: The Association of the Bar of the City of New York (Letter From The President), vol. 2, no. 9 (Oct. 1987). New York State Constitution requires that a proposed constitutional amendment be passed by two separate Legislatures after an intervening general election and that the second passage take place during the first session of the newly elected Legislature. The failure of the Legislature to give second passage, so that the proposal could be submitted to vote by the citizens of New York State, sets back the movement for court reorganization by at least two years, if not longer.

49. McMahon, *Court Merger Buried by Legislature*, 198 N.Y.L.J., July 14, 1987, at 1, col. 3.

50. See *supra* note 48 and accompanying text.

quently, the same question can be in one system or another depending on how it is brought.<sup>51</sup> Similarly, our current byzantine court structure means that some justices have greater staffs and facilities than are available to others presiding over cases of major importance.<sup>52</sup> Robert M. Kaufman, president of the Association of the Bar of the City of New York, has recently remarked that "the cost of inefficiency" is high and "justice is denied" to many litigants.<sup>53</sup> We should seek strength from the words of Chief Judge Sol Wachtler who states, "Court merger, like all elements of court reform, is not a game for the short winded."<sup>54</sup>

Your author hopes that next year's Survey can discuss the movement for a logical structure of the courts more optimistically.

### *B. Proposed Amendments to the Uniform Rules for the Trial Courts*

The proposed amendments to the Uniform Rules were distributed to the bench and bar on July 15, 1987,<sup>55</sup> and should be effective, as revised, by April 1, 1988.<sup>56</sup> The proposed amendments make changes in the Supreme Court Civil Rules with respect to the Individual Assignment System (IAS) and make a substantial number of changes in the Surrogate's Court rules. The proposed amendments include sections 202.3 (individual assignment system), 202.6 (request for judicial intervention), 202.7 (calendar of

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51. See *id.*

52. See *id.*

53. See *id.*

54. See McMahon, *supra* note 49 and accompanying text.

55. See Memorandum from Chief Administrative Judge Albert M. Rosenblatt, *Proposed Amendments to the Uniform Rules for the Trial Courts* (July 15, 1987) (on file in the Law Review Office at Syracuse University College of Law).

56. Telephone interview with William Bullman, Esq., of the Office of Court Administration (OCA) and Professor Jay C. Carlisle (Dec. 14, 1987) (Mr. Bullman's customary modesty prevents him from taking credit for the development and implementation of the new uniform rules; however the bench and bar know better and respectfully salute him for his many contributions to our profession.) For the bar's response to the uniform rules and the individual assignment system, see *generally IAS Gets Good, Poor Marks In State Survey of Lawyers*, 198 N.Y.L.J., Nov. 3, 1987, at 1, col. 3 (discussing state bar survey of 3,000 lawyers and concluding that the results "seem to indicate that negative feelings expressed towards IAS are . . . the result of dissatisfaction of the way the system is working and not with the concept of IAS."). See also Wise, *OCA Data On IAS Judges: How the Lawyers View It*, 198 N.Y.L.J. Oct. 23, 1987, at 1, col. 3 (including statistics on dispositions by judges handling civil cases in State Supreme Court in Manhattan); Note, *OCA's Rule-Making Procedures Explained By Chief Administrative Judge*, 29 State Bar News, at 2, (Dec. 1987).

motions, uniform notice of motion form, and affirmation of good faith), 202.8 (motion procedure), and 202.12 (preliminary conference) of the Uniform Civil Rules of the Supreme Court and County Court.<sup>57</sup>

The proposed changes suggested for the IAS rules include: sections 202.3 (adding an exception to the IAS for the optional creation of a "dual track" system of assignment of trial-ready cases), 202.6 (adding a requirement limited to New York City that a copy of the receipt of purchase of an index number be attached to the request for judicial intervention), and 202.8 (streamlining the requirements for the submission of motion papers and the scheduling of the hearing motions).<sup>58</sup> Section 202.12 will make the requirement of a mandatory preliminary conference optional,<sup>59</sup> and section 202.7 (requiring an attorney's affirmation of good faith with respect to a motion) will be limited to disclosure and bill of particulars motions.<sup>60</sup>

### C. Proposed Sanctions For Frivolous Litigation Practices

The Office of Court Administration (OCA) distributed its proposed rule on sanctions for frivolous litigation practices on July 15, 1987.<sup>61</sup> There has been a large and vociferous response to the pro-

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57. *Id.*

58. *Id.*

59. *See id.*

60. *See id.* Mr. Bullman stated that "it is highly likely" that U.R. 202.7 will be limited to disclosure and bill of particulars motions. He also reminded your author that the final decision on every proposed rule, as well as the date of its implementation, will be made by a majority of the Administrative Board which consists of Chief Judge Wachtler and the presiding justices of the four appellate divisions.

61. *See* Memorandum from Chief Administrative Judge Albert M. Rosenblatt, *supra* note 55; *see also* Proposed Part 37 of the Rules of the Chief Judge, *Award of Costs and Impositions of Financial Sanctions For Frivolous Conduct In Civil Litigation* (copy on file at the Law Review Office of the Syracuse University College of Law). For a text of the rules, *see* 198 N.Y.L.J., Aug. 21, 1987, at 3. *See also* Menaker, *Sanctions for Frivolous Litigation: Should New York Have a Counterpart to Federal Rule 11*, 59 N.Y.S. Bar J. 31 (Nov. 1987). *See generally* D. Wise, *County Bar Report Objects to Draft of Sanction Rules*, 198 N.Y.L.J., Oct. 5, 1987, at 1, col. 1 (discussing many objections to the OCA draft for court imposed sanctions against attorneys who engage in frivolous litigation); *Comment Asked On Rules Plan For Sanctions*, 198 N.Y.L.J. Aug. 21, 1987, at 1 col. 2; S. Stein, *Roundup of Significant Rulings by New York Court of Appeals*, 198 N.Y.L.J. Mar. 12, 1987 at 1, col. 3 (discussing *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 503 N.E.2d 681, 511 N.Y.S.2d 216 (1986), as well as the concept of court imposed sanctions).

posed rule<sup>62</sup> and, by the *Survey's* date of publication, the Administrative Board should have decided whether to accept or reject it.<sup>63</sup>

The rule, if adopted, will be part 130 of the Rules of the Chief Administrative Judge.<sup>64</sup> Part 130 applies to frivolous conduct for "any civil action or proceeding" and thereby extends CPLR 8303-a<sup>65</sup> to all other forms of action.<sup>66</sup> Although costs and sanctions together can not exceed \$10,000,<sup>67</sup> an award may be made to a party or attorney<sup>68</sup> as a compensatory award.<sup>69</sup> An award may be made against a party or attorney; however, if made against the attorney, the proceeds will be paid to the Client's Security Fund.<sup>70</sup> Under part 130 of the Rules, no award can be made except by motion on notice or by the courts *sua sponte*.<sup>71</sup> This rule requires that there be a "reasonable opportunity to be heard." Additionally, the court must define in a "written memorandum" the offensive behavior and discuss why it constitutes "frivolous conduct."<sup>72</sup>

It should be noted that part 130 of the Rules has been severely criticized on the grounds that, like its counterpart, FRCP 11,<sup>73</sup> it

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62. See Wise, *County Bar Report Objects to Draft of Sanction Rules*, 198 N.Y.L.J., Oct. 5, 1987, at 1, col. 1; *Report of the Sanctions Subcommittee of the New York State Bar Association Committee on the CPLR* (discussing reasons for and against adopting rule) [hereinafter NYSBA CPLR Committee Sanctions Report] (on file at the Law Review Office of the Syracuse University College of Law); Telephone interview with William Bullman, Esq., of the OCA (Dec. 14, 1987); see also *supra* notes 56-60 and accompanying text.

63. Telephone interview with Michael Colodner, Esq., Counsel to the OCA, (Dec. 14, 1987).

64. See Memorandum from Chief Administrative Judge Albert M. Rosenblatt, *supra* note 55.

65. See N.Y. CPLR 8303-a (McKinney 1981 & Supp. 1987) (assesses costs and reasonable attorney's fees of up to \$10,000 when frivolous claims or defenses are filed in tort cases in New York State courts); see Carlisle, *supra* note 7, at 79-82; Carlisle, *CPLR 8303-a: Attorney's Fees Sanctions for Frivolous Claims and Defenses Filed in Tort Cases*, 14 Westchester Bar J., 273 (Summer 1987) (for a more complete discussion of CPLR 8303-a).

66. See *supra* note 64.

67. See *id.*

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.*

72. See *id.*; see also Siegel, 331 N.Y.S. L. Dig. (July 1982) (full discussion of the proposed rule including a fifteen-point checklist alerting the members of the bar to the more apparent features of the sanctions rule).

73. See Fed. R. Civ. P. 11. See generally Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987); Cavanagh, *Developing Standards Under Amended rule 11 of the Federal Rules of Civil Procedure*, 14 HOFSTRA L. REV. 66 (Spring 1986) For the most recent *Survey* year discussion of how Federal Rules of Civil

will generate unnecessary motion practice.<sup>74</sup> The practitioner should also be aware that Assembly Bill 8193,<sup>75</sup> if enacted, would extend CPLR 8303-a to all civil actions.<sup>76</sup> It will, however, apply sanctions more narrowly than the rule proposed by the OCA.<sup>77</sup> Assembly Bill 8193 provides explicit protection for intellectually novel arguments and establishes a statutory appeals process whereby a judge can be reversed.<sup>78</sup> In any event, whether it be by the legislature or the courts, civil practice lawyers should expect a sanction rule to be in effect shortly after the publication of this *Survey*.

#### *D. New Rules for Appellate Term in the Second Department*

Effective March 1, 1988 a comprehensive revision of the rules governing the filing of appeals in the appellate terms in Appellate Division, Second Department, becomes operable.<sup>79</sup> The principal

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Procedure is applied in New York federal courts, see Silberberg, *Civil Practice Roundups in Southern District*, 198 N.Y.L.J., Dec. 3, 1987, at 1, col. 1 (discussing significant sanctions decisions handed down by the Southern District in October, 1987). See also Kohn, *Frivolous Suits Cause Sanctions In U. S. Court*, 198 N.Y.L.J., Sept. 9, 1987, at 1, col. 2 (discussing fines against both litigants and their lawyers).

74. See Chase, *Sanctions in State Courts—Proposed Rule Needs Changes*, 198 N.Y.L.J., Oct. 22, 1987, at 1, col. 3 (disadvantages of judicial sanctions are likely to outweigh the advantages); see also Menaker, *Sanctions for Frivolous Litigation: Should New York Have a Counterpart to Federal Rule 11*, 59 N.Y.S.B.J. 31 (Nov. 1987) (federal rule has a number of weaknesses to be avoided in any New York rule). For a discussion of the pitfalls of Rule 11, see generally Bates, *The Rule 11 Debate, 4 Years Later*, Nat'l Law J., Oct. 13, 1987, at 3, col. 1.

75. See E.J. McMahon, *Assembly Bill Would Impose Sanctions for Frivolous Suits*, 198 N.Y.L.J., Sept. 18, 1987, at 1, col. 3 (discussing proposed additional sanctions for frivolous lawsuits and baseless pleadings).

76. See *id.*

77. Telephone interview with Assemblyman Daniel L. Feldman (Dec. 17, 1987). Assemblyman Feldman of Brooklyn is the sponsor of Assembly Bill 8193 and advises your author that it explicitly provides for protection of intellectually novel arguments, provides for a more equitable statutory appeals process, limits the cap on awards, fees and costs, and removes the aura of a "chilling effect" that currently exists in connection with the OCA proposed sanction rule.

78. See *id.* In response to Assemblyman Feldman's observation, William Bullman of the OCA argues that the proposed OCA sanctions rule should not be confused with the federal rule. The OCA rule abbreviates many of the Rule 11 pitfalls: *i.e.*, it places a lid on the award; carefully construes the phrase frivolous; gives the trial judge discretionary power to impose the sanction; and provides for more due process in the form of hearings than does its federal counterpart.

79. A copy of these revisions is on file in the Law Review Office at the Syracuse University College of Law.

differences for litigators are new rules affecting the calendaring of cases. Under the new rules, notes of issue for civil cases must be filed on or before the first Friday of the month.<sup>80</sup> In addition, the appellant must supply blank stamped post cards addressed to every appellant and respondent.<sup>81</sup> Notification of the term to which an appeal has been assigned will be accomplished by using the postcards. Other portions of the new rules can be obtained from the Appellant Term.

### III. JURISDICTION

#### A. *Constitutional Limitations on In Personam Jurisdiction*

Last year's *Survey* discussed some of the relevant constitutional considerations necessary for the assertion of jurisdiction in New York.<sup>82</sup> During this *Survey* year the United States Supreme Court analyzed these considerations in *Asahi Metal Industry Co. v. Superior Court of California*.<sup>83</sup> Although the case has generated sparse comment,<sup>84</sup> *Asahi* merits discussion because of its approach to the doctrine of minimum contacts.<sup>85</sup> It also serves as another example of how fourteenth amendment due process limitations are placed on state-structured long arm statutes in unintentional tort cases.<sup>86</sup>

The *Asahi* facts are simple.<sup>87</sup> The plaintiff, Gary Zurcher, lost control of his Honda motorcycle and collided with a tractor.<sup>88</sup> Zurcher was severely injured and his wife, a passenger, was killed.<sup>89</sup>

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80. *See id.*

81. *See id.*

82. *See* Carlisle, *supra* note 7, at 85-88.

83. 107 S. Ct. 1026 (1987) (holding that the exercise of jurisdiction by the California court over a Japanese manufacturer would be unreasonable and unfair).

84. *See* Repa, *Supreme Court Preview*, 72 A.B.A.J., Dec. 1, 1986, at 42; Stewart, *Supreme Court Report*, A.B.A.J., Apr. 1, 1987, at 45; Hoenig, *Products Liability*, 198 N.Y.L.J., May. 27, 1987, at 1, col. 1.

85. *See infra* notes 103-31 and accompanying text.

86. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); *see also* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 407 (1984). *See generally* Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Calder v. Jones, 465 U.S. 783 (1984); J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE § 301.03 (1986) [hereinafter WEINSTEIN, KORN & MILLER]; Siegel, 297 N.Y. St. L. Dig. 1 (1984) (state "long-arm" statutes are more expansively construed in cases involving intentional torts).

87. *See* 107 S. Ct. at 1029.

88. *See id.*

89. *See id.*

Zurcher filed a products liability action in the Superior Court of the State of California alleging that the accident was caused by an explosion in the rear tire of the motorcycle and that the tire, tube, and sealant were defective.<sup>90</sup> The complaint, filed by Zurcher, named, *inter alia*, Cheng Shin Rubber Industrial Co. (Cheng Shin), the Taiwanese manufacturer of the tube.<sup>91</sup> Cheng Shin filed a cross-complaint seeking indemnification from its co-defendants and from Asahi Metal Industry Co. (Asahi), the Japanese manufacturer of the tube's valve assembly.<sup>92</sup> After Zurcher's claims were settled for \$300,000, the only remaining part of the lawsuit was Cheng Shin's indemnification claim against Asahi.<sup>93</sup> Asahi moved to quash Cheng Shin's service of summons on the grounds that California could not exert jurisdiction over it consistent with the due process clause of the fourteenth amendment.<sup>94</sup>

Asahi argued that the valve assemblies were sold to Cheng Shin in Taiwan and that Asahi had no offices, property, or agents in California and made no direct sales within the state.<sup>95</sup> As a result, Asahi claimed that it did not have the minimum contacts with California that were necessary for personal jurisdiction to satisfy the due process clause.<sup>96</sup> Asahi also alleged that jurisdiction in California was unfair because the action involved a dispute between a Japanese company and a Taiwanese company.<sup>97</sup> The California Supreme Court ruled that Asahi had to defend the action in California.<sup>98</sup> The court based its decision on the fact that Asahi intention-

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90. *See id.*

91. *See id.*

92. *See id.* at 1029-30.

93. *See id.* at 1030.

94. *See id.* at 1029. California's long-arm statute authorizes the exercise of jurisdiction "on any bases not inconsistent with the Constitution of this state or of the United States." CAL. CIV. PROC. CODE § 410.10 (West 1973) (this statute is far more expansive than New York's long-arm statute CPLR 302 which does not provide for in personam jurisdiction in every case in which due process will permit it). *See Banco Ambrosiano S.P.A. v. Aroc Bank & Trust, Ltd.*, 62 N.Y.2d 65, 71-72, 464 N.E.2d 432, 435, 476 N.Y.S.2d 64, 67 (1984).

95. *See Asahi*, 107 S. Ct. at 1030.

96. *See id.*

97. *See id.*

98. *See Asahi Metal Industry Co. v. Superior Court*, 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985). The California Supreme Court noted that "Asahi has no offices, property or agents in California and has made no direct sales [in California]." *Id.* at 48-49, 702 P.2d at 549-50, 216 Cal. Rptr. at 392. Moreover, "Asahi did not design or control the system of distribution that carried its valve assemblies into California." *Id.* at 49, 702 P.2d at 549, 216 Cal. Rptr. at 392. Nonetheless, the California Supreme Court held that the exercise of in



ally placed its valve assembly components into the stream of commerce and was aware that some of them would eventually find their way into California.<sup>99</sup> The United States Supreme Court reversed in a complex voting pattern.<sup>100</sup> Justice O'Connor announced the Court's judgment, and her opinion was joined in its entirety by Justice Powell and Chief Justice Rehnquist. The judgment in Part I was unanimous; four members of the Court joined the plurality opinion in Part II-A.<sup>101</sup> Eight members of the Court joined the opinion in Part II-B, and five justices participated in two separate concurrences disagreeing with the plurality opinion in Part II-A.<sup>102</sup> Thus, the opinion consists of three parts and two concurrences.<sup>103</sup> The bottom line is that a unanimous Court concluded that it was unreasonable for California to assert personal jurisdiction over Asahi.<sup>104</sup>

### 1. Parts I, II & III

Justice O'Connor announced the judgment of a unanimous Court with respect to Part I and an opinion for eight members of

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personam jurisdiction over Asahi was consistent with the due process clause. *See id.* at 54, 702 P.2d at 555, 216 Cal. Rptr. at 396.

99. *See id.* at 42, 702 P.2d at 550, 216 Cal. Rptr. at 392. "When Asahi sold valve assemblies to Cheng Shin with knowledge that they would be placed in tubes sold in California, its purpose fully availed itself of the California market and the benefits and protections of California's laws." *Id.*

100. *See Asahi*, 107 S. Ct. at 1029; *see also infra* note 103 and accompanying text.

101. *See id.*

102. *See id.*

103. The lineup for the *Asahi* opinion is as follows: Part I, a unanimous Court agrees not to assert jurisdiction over Asahi; Part II-A, Justice O'Connor, Chief Justice Rehnquist, Justice Powell, and Justice Scalia issue a plurality opinion urging that jurisdiction should not be asserted over Asahi under the stream of commerce theory; Part II-B, all Justices with the exception of Justice Scalia join the opinion of the Court which holds that it would be unreasonable to assert jurisdiction over Asahi; Part III, a one paragraph statement joined by Justices Rehnquist, Powell, Scalia, and O'Connor that the facts in *Asahi* do not establish jurisdiction under stream of commerce; Concurrence I, Justice Brennan, joined by Justices White, Marshall, and Blackmun, agreeing with the Court's judgment in Part I and conclusion in Part II-B that the exercise of personal jurisdiction over Asahi would not comport with fair play and substantial justice, but disagreeing with the plurality's conclusion that Asahi did not purposely avail itself of the California market; and Concurrence II, Justice Stevens, joined by Justices White and Blackmun join Parts I and II-B but do not join Part II-A for two reasons: first, an examination of minimum contacts was not necessary to the Court's decision, and second, assuming such an examination to be necessary, Part II-A misapplied its "contacts" analysis to the facts of the case.

104. *See id.*

the Court with respect to Part II—B.<sup>105</sup> She also delivered an opinion with respect to Part II—A and Part III in which Chief Justice Rhenquist and Justices Scalia and Powell joined.<sup>106</sup>

## 2. Part II-B: No Jurisdiction Over Asahi

Using the traditional convenience test developed in *International Shoe Co. v. Washington*,<sup>107</sup> the Court's opinion in Part II-B which was joined by all justices with the exception of Scalia, considered the burden on the defendant, the plaintiff's interest in having a forum in which to litigate, the interests of the forum state, and the interests of the interstate judicial system.<sup>108</sup> The critical consideration was that the entire law suit, other than Cheng Shin's claim against Asahi, had been resolved.<sup>109</sup> Because neither remaining party was a resident of California, the Court found California's interest in the case to be minimal.<sup>110</sup> Additionally, the Court did not favor California law governing the question of an indemnification claim between two foreign parties.<sup>111</sup> Moreover, the Court warned that "great care and reserve should be exercised when extending notions of personal jurisdiction into the international field," and stressed the heavy burden on the alien defendant.<sup>112</sup> Justice Brennan, who since his appointment to the United States Supreme Court has never voted against finding personal jurisdiction, agreed with the Court's conclusion in Part II-B that the exercise of personal jurisdiction over Asahi would not comport with the requirements of *International Shoe v. Washington*.<sup>113</sup> Brennan stated that *Asahi* was one of those rare cases in which "minimum requirements inherent in the concept of 'fair play and substantial justice' . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities."<sup>114</sup>

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105. See *id.*

106. See *id.*

107. See 326 U.S. 310 (1945).

108. See *Asahi*, 107 S.Ct. at 1033-35.

109. See *id.*

110. See *id.*

111. See *id.*

112. See *id.* at 1035.

113. See *id.* at 1035-38 (citing *International Shoe*, 326 U.S. 310).

114. See *id.* at 1035. It is also interesting to note that *Asahi* appears to be the first unanimous Supreme Court decision against in personam jurisdiction since the Court's 1945 decision in *International Shoe*.

### 3. *Part II-A: Purposeful Availment (The Stream of Commerce Theory)*

Part II-A of the opinion is a plurality holding unnecessary to the Court's unanimous decision not to assert jurisdiction.<sup>115</sup> Four members of the Court urged in Part II—A that the mere placement of a product into the stream of commerce, without additional activities, was not a purposeful act by the defendant directed toward the forum state.<sup>116</sup> The plurality found that "something" more was required and referred to activities which evidence an "intent" or "purpose" to serve the market in the forum state.<sup>117</sup> The plurality suggested these activities include designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state.<sup>118</sup> Because the facts only established Asahi's awareness that some of the valves sold to Cheng Shin would be incorporated into the tire tubes sold in California, the plurality concluded that Asahi did not purposefully avail itself of the California market.<sup>119</sup> Thus, according to the plurality, jurisdiction cannot be asserted over a nondomiciliary defendant whose only contacts with the forum state consist of the placement of a product into the stream of commerce.<sup>120</sup>

### 4. *Part II-A: Concurring Opinion by Justice Brennan*

Justices White, Marshall, and Blackmun, who joined in the opinion not to uphold jurisdiction, also joined Justice Brennan's concurring opinion that the plurality's reasoning in Part II-A was a narrow construction of the stream of commerce theory and represented a "marked retreat" from the Court's analysis in *World-Wide Volkswagen Corp. v. Woodson*.<sup>121</sup> Justice Brennan reasoned

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115. See *Asahi*, 107 S.Ct. at 1031-33.

116. See *id.* at 1033 ("additional conduct" may consist of "designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as a sales agent in the forum state.").

117. See *id.* at 1032-33.

118. See *id.*

119. See *id.*; see also *supra* notes 87-90 and accompanying text.

120. See *Asahi*, 107 S. Ct. at 1033.

121. See *id.* at 1035-36 (citing *World-Wide Volkswagen*, 444 U.S. 286).

that once Asahi placed its product in the "stream of commerce," and was generally aware that the final product was being marketed in California, "the possibility of a lawsuit there cannot come as a surprise."<sup>122</sup> Justice Brennan found that a defendant's awareness that the stream of commerce may or will sweep a product into the forum state constitutes purposeful awareness.<sup>123</sup> Brennan saw no need for a "showing" of additional activities and reasoned that a defendant who places goods into the stream of commerce benefits economically from the retail sale of the final product in the forum State and indirectly benefits from the state's laws that regulate and facilitate commercial activity.<sup>124</sup>

### 5. Part II-A: Concurring Opinion by Justice Stevens

In a second concurring opinion, Justices Stevens, White, and Blackmun, who had joined the decision not to uphold jurisdiction, also disagreed with the plurality's purposeful availment (stream of commerce) analysis in Part II-A.<sup>125</sup> First, Justice Stevens pointed out that it was not necessary to the Court's decision.<sup>126</sup> Second, he observed that even assuming the plurality's purposeful availment analysis ought to be formulated, Part II-A misapplied it to the *Asahi* facts.<sup>127</sup> Stevens criticized the assumption that an unwavering line could be drawn between "mere awareness" that a component would find its way into the forum state and "purposeful availment of the forum's market."<sup>128</sup>

Justice Stevens emphasized a constitutional analysis that is effected by the volume, value, and hazardous character of the com-

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122. *See id.*; *see also* C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* 1069 (1969); Mehren & Trautman, *Jurisdiction to Adjudicate A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) (providing a full definition of the stream of commerce theory); Currie, *The Growth of the Long-Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. LAW FORUM, 533, 546-560 (1963) (tracing development of the stream of commerce theory). Interestingly enough, Justice White, who authored the opinion in *World-Wide Volkswagen*, subscribes to this notion as he does to the observation that jurisdiction "premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause and [has] not required a showing of additional conduct." *See Asahi*, 107 S. Ct. at 1035.

123. *See Asahi*, 107 S. Ct. at 1035.

124. *See id.*

125. *See id.* at 1038.

126. *See id.*

127. *See id.*

128. *See id.*

ponents to determine if Asahi had engaged in a "higher quantum of conduct" than placement of a product into the stream of commerce without more.<sup>129</sup> This approach represents a middle ground between the plurality opinion with respect to Part II—A and Justice Brennan's concurrence thereto. Justice Stevens explained that based on the volume, value, and hazardous character of the components, Asahi had engaged in a higher quantum of conduct than the mere placement of a product into the stream of commerce.<sup>130</sup> Justice Stevens concluded that a regular course of business activity that results in deliveries of over 100,000 units annually over a period of several years would constitute a "purposeful availment" even though the item delivered to the forum state was a standard product marketed throughout the world.<sup>131</sup> This analysis by Justice Stevens is similar to the approach followed by New York State appellate courts in *Dariento v. Wise Shoe Stores Inc.*<sup>132</sup> and in *Allen v. Canadian Electric Co.*<sup>133</sup> It is also compatible with the Court of Appeals' decision in *Sybron Corp. v. Wetzel*.<sup>134</sup>

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129. See *id.*

130. See *id.*

131. See *id.* at 1038. Justice Stevens first explains that Part II-A of the opinion was not necessary to the Court's decision. "An examination of minimum contacts is not always necessary to determine whether a state court's assertion of personal jurisdiction is constitutional." *Id.* He then states that "even assuming that the test ought to be formulated here, Part II-A misapplies it to the facts of this case." *Id.* Justice Stevens agrees with the Brennan view of minimum contacts but is cautious that "a higher quantum of conduct" than the mere placement of a product into the stream of commerce is necessary. *Id.* He suggests that delivering 100,000 units annually over a period of several years constitutes purposeful availment "even though the item delivered to the forum state was a standard product marketed throughout the world." *Id.*

132. 74 A.D.2d 342, 427 N.Y.S.2d 831 (2d Dep't 1980) (New Hampshire seller of shoes to Tennessee retailer could have foreseen that five percent of the shoes would end up in the New York market). But see *Martinez v. American Standard*, 91 A.D.2d 652, 457 N.Y.S.2d 97 (2d Dep't 1982), *aff'd*, 60 N.Y.2d 873, 458 N.E.2d 826, 470 N.Y.S.2d 367 (1983).

133. 65 A.D.2d 39, 410 N.Y.S.2d 707 (3d Dep't 1978) (although it amounted to only one percent of defendants sales, the approximately nine million dollars per year generated in New York was deemed substantial).

134. 46 N.Y.2d 197, 385 N.E.2d 1055, 413 N.Y.S.2d 127 (1978). Jurisdiction was sustained when the plaintiff alleged that defendant had sought to hire one of the plaintiff's former employees in order to tortiously induce him to reveal trade secrets to the defendant. See *Sybron*, 46 N.Y.2d at 203-04, 385 N.E.2d at 1058, 413 N.Y.S.2d at 130-31. The Court of Appeals held that forum consequences could be foreseen within the meaning of subparagraph (ii) of CPLR 302 (a)(3) because "[g]iven that Sybron manufactures the equipment in New York, that Wetzel worked at Sybron in New York for 34 years, and that Sybron customers in New York are being pursued, it is reasonable that De Deitrich foresee New York as the place injury will occur." *Id.* at 206, 385 N.E.2d at 1060, 413 N.Y.S.2d at 132.

## 6. *Effect of Asahi's Constitutional Consideration in New York*

There remains the question of what guidance the *Asahi* opinion provides for the New York bar. After 110 years of jurisdictional developments since *Pennoyer v. Neff*,<sup>135</sup> is *Asahi* the best the United States Supreme Court can do? Clearly, indemnification claims between two alien defendants, such as in *Asahi*, will not warrant an assertion of in personam jurisdiction by a New York court.<sup>136</sup> *Asahi*, however, portends that our courts may assert long-arm jurisdiction over alien and domestic defendants who place products into the international or interstate markets even if there is not a specific showing of awareness that the products were

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135. 95 U.S. 714 (1877). In *Pennoyer v. Neff*, Justice Field, writing for the majority, set forth two interrelated rules: (1) "that every State possesses exclusive jurisdiction and sovereignty over the persons and property within its territory," and (2) "that no State can exercise direct jurisdiction and authority over persons or property without its territory." *Pennoyer*, 95 U.S. at 722. After *Pennoyer*, there have been several major incursions upon the rigidity of the territorial theory and several bases for extraterritorial jurisdiction developed. Under present law, as enunciated by *International Shoe*, 326 U.S. at 320, the test for subjecting a nondomiciliary to a forum in personam jurisdiction is that "he have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* The *Shoe* test has been refined by the U.S. Supreme Court in recent years. Immediately prior to its opinion in *Asahi*, the Court issued opinions in the following key cases: *Burger King v. Rudzewicz*, 471 U.S. 462 (1985) (nonresident defendant who voluntarily entered into a contract that had a substantial connection with the forum state subject to that state's jurisdiction in a suit for breach of contract even though he had never been in the forum state); *Calder v. Jones*, 470 U.S. 522 (1984) (defendant was within the constitutional reach of California courts even though he had never been in California, because he intentionally committed acts in Florida with knowledge that the acts could injure the plaintiff in California); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 407 (1984) (drawing an important distinction between general and specific jurisdiction, implying that in cases of specific jurisdiction, *i.e.*, when the suit arises out of or is related to the defendant's contacts with the forum state, fewer contacts were necessary); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (defendant, an Ohio corporation, could reasonably anticipate suit in a New York court on a libel action based on the contents of its magazine, where defendant's magazine was circulated regularly in that state); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (defendant's conduct and connection with the forum state must be such that he could reasonably anticipate being subject to suit in that state); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (defendant must have purposefully availed himself of the benefits and protections of the forum state's laws); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (abandoning the traditional approach to determining in rem and quasi in rem jurisdiction, which allowed the presence of property within the state to serve, without more, as a basis for exercising power over that property and holding that all assertions of state power were to be measured by the due process standard set forth in *International Shoe*).

136. See *Asahi*, 107 S.Ct. at 1035.

targeted for New York.<sup>137</sup> Thus, the foreseeability element, a key one under the jurisdictional requirements of subparagraph (ii) of CPLR 302(a)(3),<sup>138</sup> may be given as much effect as the statute envisions. Practitioners, however, should note that at least one appellate division has held that a third-party defendant that manufactured a component part of a defendant's product is not subject to jurisdiction under CPLR 302(a)(3)(ii)<sup>139</sup> merely because the defendant sells its products in New York.<sup>140</sup> In *Martinez v. American Standard*,<sup>141</sup> the Appellate Division, Second Department, concluded that there was no indication that the third-party defendant knew or should have known that its customer was serving a New York market.<sup>142</sup> The Second Department stated that in order to meet the constitutional standards for an assertion of jurisdiction as set forth in *Hanson v. Denckla*<sup>143</sup> and *World-Wide Volkswagen Corp. v. Woodson*,<sup>144</sup> it must be shown that the manufacturers made a "discernible effort to serve, directly or indirectly, a market within the forum state."<sup>145</sup> This view seems to be at odds with the position of at least five justices of the current United States Supreme Court who lean toward a more expansive view of long-arm jurisdiction.<sup>146</sup>

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137. See *id.*

138. See N.Y. CPLR 302(a)(3) (McKinney Supp. 1988); see also *infra* note 146 and accompanying text; Siegel, 329 N.Y.S.L.Dig. 4 (1987) (five justices stop short of rejecting the stream of commerce theory).

139. See N.Y. CPLR 302(a)(3) (McKinney Supp. 1988).

140. See *supra* notes 123-37 and accompanying text.

141. 91 A.D.2d 652, 457 N.Y.S.2d 97 (2d Dep't 1982), *aff'd*, 60 N.Y.2d 873, 458 N.E.2d 826, 470 N.Y.S.2d 367 (1983). Because there was no evidence showing that the component part maker knew where the air conditioners were going or that it had tried to reach the New York market through the compressor manufacturer, there was no purposeful availment necessary for the assertion of in personam jurisdiction. See *Martinez*, 91 A.D.2d at 654, 457 N.Y.S.2d at 99. In *Asahi* there was evidence enough to convince at least five justices that the component part maker knew its product was intended for California. See *supra* notes 103-12 and accompanying text. Compare *Martinez v. American Standard*, 91 A.D.2d 652, 457 N.Y.S.2d 97 (2d Dep't 1982) with *Dariento v. Wise Shoe Stores, Inc.*, 74 A.D.2d 342, 472 N.Y.S.2d 831 (2d Dep't 1980) (where the Appellate Division, Second Department, reached a different result). Both cases are discussed and applied in *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 743 (2d Cir. 1985).

142. See *Martinez*, 91 A.D.2d at 653-54, 457 N.Y.S.2d at 99.

143. 357 U.S. 235 (1958).

144. 444 U.S. 286 (1980).

145. See *Martinez*, 91 A.D.2d at 653-54, 457 N.Y.S.2d at 99.

146. Justice Brennan's stream of commerce theory does not require the specific elements of foreseeability that the Second Department found to be necessary in *Martinez*. See *supra* note 141 and accompanying text. The Brennan view, which seems to be the position

Finally, the *Asahi* opinion alerts the practitioner to the importance of developing a detailed record for purposes of preventing a dismissal on jurisdictional grounds.<sup>147</sup> The factual record in *Asahi* was sparse.<sup>148</sup> Consequently, the New York practitioner, faced with a jurisdictional motion to dismiss under CPLR 3211(a) should insist on the "jurisdictional disclosure" provided for by subsection (d) of CPLR 3211.<sup>149</sup> In this respect it is important to note the different standards for disclosure in state and federal practice. In state courts, good faith conclusory allegations of jurisdiction present a "sufficient start" to entitle the plaintiff to disclosure on jurisdictional issues.<sup>150</sup> In federal courts, the plaintiff must make a prima facie showing of jurisdiction in order to proceed with discovery.<sup>151</sup>

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of a majority of federal courts, is supported in *Asahi* by Justices White, Marshall, Blackmun, and as modified by Stevens. Nonetheless the practitioner should note that New York's state constitution has a due process clause which may require more than the federal counterpart. See *Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978).

147. See *infra* notes 148-49 and accompanying text.

148. See *Asahi*, 107 S. Ct. at 1030. No discovery or traverse hearing was held in connection with the motion to dismiss for lack of jurisdiction; both sides merely submitted conflicting affidavits regarding foreseeability. See *id.*

149. See N.Y. CPLR 3211(d) (McKinney 1979 & Supp. 1988). This section, entitled "Facts unavailable to opposing party," provides that:

Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

*Id.* Subdivision (d) is similar to Federal Rule 56(f) and is analogous to CPLR 3212(f). It not only protects the party to whom essential facts are not presently available, but also enables the court before whom the motion is made to supervise disclosure. For a recent application of CPLR 3211 (d), see *Ramsey v. Mary Imogene Bassett Hospital*, 113 A.D.2d 149, 495 N.Y.S.2d 282 (3d Dep't 1985) (holding that discovery was warranted); see also *O'Connor v. Bonanza Interior*, 129 A.D.2d 569, 514 N.Y.S.2d 67 (2d Dep't 1987) (holding that CPLR 3211(d) should be used more often in jurisdictional disputes); WEINSTEIN, KORN & MILLER, *supra* note 86, at § 301.07 n.39 (citing *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463, 467, 310 N.E.2d 513, 515, 354 N.Y.S.2d 905, 908 (1974), for proposition that the Court of Appeals favors jurisdictional discovery).

150. See WEINSTEIN, KORN & MILLER, *supra* note 86, at § 301.07.

151. See C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1069 (1969).



## B. Bases for Exercise of Jurisdiction

### 1. CPLR 301: General Jurisdiction<sup>152</sup>

The traditional bases for the exercise of jurisdiction that developed prior to the adoption of the CPLR were incorporated into it by CPLR 301.<sup>153</sup> Thus, personal jurisdictions based on physical presence,<sup>154</sup> domicile,<sup>155</sup> consent,<sup>156</sup> or "doing business"<sup>157</sup> permits New York courts to assert jurisdiction over a defendant for any cause of action irrespective of whether it arises from the defendant's contacts with New York.<sup>158</sup>

The "doing business" concept is frequently used to obtain jurisdiction over a foreign corporation.<sup>159</sup> Although the Court of Appeals has stated that "[t]he test for doing business is and should be a simple pragmatic one . . . ,"<sup>160</sup> a review of the cases decided during the *Survey* year indicates that the test, while pragmatic, is far from simple. Four cases are worthy of comment. In *Rolls-Royce Motors, Inc. v. Charles Schmitt & Co.*,<sup>161</sup> Judge Leisure held that

152. See N.Y. CPLR 301 (McKinney 1972 & Supp. 1988).

153. See *id.*

154. See *id.* Two exceptions should be noted: a person is not deemed present in New York for purposes of process service when he was induced to enter by fraud, and he has immunity from process when he appears voluntarily, as a plaintiff or defendant, to attend proceedings involving criminal or civil litigation.

155. See N.Y. CPLR 313 (McKinney 1972 & Supp. 1987) (New York domiciliary subject to in personam jurisdiction on any claim, wherever it arises, and wherever the defendant is located at the time the summons is served).

156. See N.Y. CPLR 301 (McKinney 1972 & Supp. 1988).

157. See *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917); *Bryant v. Finnish National Airlines*, 15 N.Y.2d 426, 432, 208 N.E.2d 439, 442, 260 N.Y.S.2d 625, 628-629 (1965); see also *Laufer v. Ostrow*, 55 N.Y.2d 305, 310, 434 N.E.2d 692, 695, 449 N.Y.S.2d 456, 458 (1982).

It is the aggregate of the corporation's activities in the State such that it may be said to be present in the state' not occasionally or casually, but with a fair measure of permanence and continuity . . . and is the quality and nature of the corporation's contacts with the State sufficient to make it reasonable and just according to traditional notions of fair play and substantial justice' that it be required to defend the action here . . . . [citations omitted])

*Laufer*, 55 N.Y.2d at 310, 434 N.E.2d at 695, 449 N.Y.S.2d at 458.

158. See *Laufer*, 55 N.Y.2d 305, 434 N.E.2d 692, 449 N.Y.S.2d 456.

159. See *supra* note 154 and accompanying text.

160. See *Bryant v. Finnish National Airline*, 15 N.Y.2d 426, 432, 208 N.E.2d 439, 442, 260 N.Y.S.2d 625, 628-629 (1965). Cf. cases collected and discussed in WEINSTEIN, KORN & MILLER, *supra* note 86, at § 301.16.

161. 657 F. Supp. 1040 (S.D.N.Y. 1987).

Schmitt & Co., was not doing business in New York.<sup>162</sup> The record established that Schmitt spent millions of dollars purchasing cars in New York and also spent substantial money on advertising.<sup>163</sup> Schmitt, the company president, visited New York every month and the company had representatives in New York.<sup>164</sup> Also, it sold numerous cars in New York, held itself out as having a New York location and conducted meetings in New York with representatives of the plaintiff.<sup>165</sup> Nonetheless, Judge Leisure, in a fifty-one page opinion, stressed the lack of "classic factors of section 301 jurisdiction"<sup>166</sup> such as: (1) maintenance of a local office or bank account in New York; (2) possession of property in New York; (3) a local phone number; and (4) employees.<sup>167</sup> Judge Leisure explained that the defendant's solicitation of business in New York plus its other activities failed to support a finding that Schmitt Co. was doing business in New York.<sup>168</sup> Relying on *Helicopteros Nacionales de Colombia v. Hall*,<sup>169</sup> Judge Leisure carefully analyzed each of the defendant's New York contacts and concluded that most of its activities involved the purchase of goods and not the sale of goods.<sup>170</sup> Furthermore, he reasoned that "purchasing activities" were of "relative unimportance" for jurisdictional purposes.<sup>171</sup>

In *Bower v. Weisman*,<sup>172</sup> Judge Sweet held that general jurisdiction could be asserted over a corporate defendant who had a New York office, a bank account, elaborate standing reimbursement procedures for business promotion and an agent to manage

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162. See *Rolls Royce Motor*, 657 F. Supp. at 1040.

163. See *id.*

164. See *id.*

165. See *id.*

166. See *id.* at 1044.

167. See *id.*

168. See *id.* "When considering this criteria, the facts presented by plaintiff fail to establish that Schmitt Co.'s presence in New York is sufficiently continuous and substantial to warrant the exercise of jurisdiction pursuant to 301." *Id.* at 1050.

169. See *id.* at 1045.

170. See *id.* (distinguishing between purchases of goods and services in New York and the sale of goods and services in New York).

171. See *id.*; see also *Standard Enterprises, Inc. v. Bag-It, Inc.*, No. 86-4508 (S.D.N.Y. 1987) (classic factors for general jurisdiction not present); *A.C.K. Sports, Inc. v. Doug Wilson Enterprises*, 661 F. Supp. 386 (S.D.N.Y. 1987) (same professional hockey player's appearance in New York seventeen times pursuant to his player contract with Illinois hockey team did not qualify as doing business).

172. 650 F. Supp. 1415 (S.D.N.Y. 1986).

its Manhattan facility.<sup>173</sup> The aggregate of these activities demonstrated that the defendant had "every indicia of a corporation 'doing business' in New York"<sup>174</sup> Similarly, in *Amalgamet, Inc. v. Ledoux & Co.*,<sup>175</sup> the court held that a New Jersey corporation was subject to general CPLR 301 jurisdiction primarily because it was registered to do business in New York and maintained a New York City telephone number.<sup>176</sup> Also, in *American Dental Cooperative, Inc. v. Attorney General*,<sup>177</sup> the Appellate Division, First Department, hinted in dicta that the "doing business" test can be satisfied without the maintenance of an office, bank account, employees, etc.<sup>178</sup> General jurisdiction will exist if there is a "pattern of systematic, regular and continuous contact"<sup>179</sup> within the State of New York.

Finally, the practitioner should be reminded of the obvious. General jurisdictional issues are crucial only when the plaintiff's cause of action does not arise out of the contacts the defendant has with the forum.<sup>180</sup> In addition, while CPLR 301 jurisdictional issues often arise in diversity actions in federal court, the decisional law of the forum state (New York) determines if a nonresident is doing business.<sup>181</sup>

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173. See *Bower*, 650 F. Supp. at 1426.

174. See *id.*

175. 645 F. Supp. 248 (S.D.N.Y. 1986).

176. See *Amalgamet*, 645 F. Supp. at 249 (foreign corporation which files a certificate of authority to do business in New York has consented to personal jurisdiction in the state).

177. 127 A.D.2d 274, 514 N.Y.S.2d 228 (1st Dep't 1987).

178. See *American Dental*, 127 A.D.2d at 280-81, 514 N.Y.S.2d at 233.

179. See *id.* at 280, 514 N.Y.S.2d at 233. In *American Dental*, the Attorney General served a subpoena on the defendant, a Delaware corporation, which was not licensed to do business in this state, alleging violation of New York's antitrust act; defendant, a purchasing cooperative for an independently owned dental equipment and supply dealers, moved to quash the subpoena on the ground of lack of personal jurisdiction. See *id.* The court held that under CPLR 301, a foreign corporation is subject to personal jurisdiction if it is doing business in New York, "not occasionally or casually, but with a fair measure of permanence and continuity." See *id.* (citing *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917)). However, the court held that it need not reach the question of whether the defendant was "doing business" in New York since defendant may be subject to jurisdiction under CPLR 302(a)(1). See *id.* Pursuant to CPLR 302(a)(1), a court may exercise personal jurisdiction over a nondomiciliary as to a cause of action arising out of the transaction of business within the state or the contracting anywhere to supply goods or services within the state. See *id.*

180. See *id.*

181. See *Amalgamet, Inc. v. Ledoux & Co.*, 645 F. Supp. 248 (S.D.N.Y. 1986) (when subject matter jurisdiction is based on diversity of citizenship, "the issue of personal jurisdiction is determined by the law of the forum state, in this case New York."); see, e.g.,

## 2. Long-Arm Jurisdiction

CPLR 302<sup>182</sup> allows New York courts to assert jurisdiction over nondomiciliary individuals and foreign corporations<sup>183</sup> not subject to CPLR 301, but having the contacts with our state which are listed in section 302.<sup>184</sup> This "long-arm" jurisdiction is limited by the terms of CPLR 302 and by federal and state constitutional considerations<sup>185</sup> to claims that arise from the defendant's New York related activity. This is the important distinction between long-arm jurisdiction and jurisdiction based on presence, doing business, consent or domicile, none of which is limited to causes of action arising from New York related activities.<sup>186</sup>

Subsection (a) of CPLR 302<sup>187</sup> deals primarily with commercial and tort related litigation.<sup>188</sup> It subjects defendants to jurisdiction for any cause of action "arising from" acts enumerated in the statute which are committed by the defendant or his agent.<sup>189</sup> The exact scope of the agency is unclear.<sup>190</sup> Several decisions during the *Survey* year illustrate that before an agency relationship can be held to exist under CPLR 302, a showing must be made that the alleged agent acted in New York for the benefit of, with the knowledge and consent of, and under some control of the nonresident principal.<sup>191</sup> Other *Survey* year decisions make it clear that CPLR

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*Arrowsmith v. United Press International*, 320 F.2d 219, 223 (2d Cir. 1963). *Cf. A.C.K. Sports, Inc. v. Doug Wilson Enterprises*, 661 F. Supp. 386, 387 (1987). The same is true when a federal courts subject matter jurisdiction is founded on the presence of federal questions. *See Business Trends Analysts v. Freedomia Group, Inc.*, 650 F. Supp. 1452 (S.D.N.Y. 1987) (citing *United States v. First Nat'l City Bank*, 379 U.S. 378, 381 (1965); *Metropa Co. v. Choi*, 458 F. Supp. 1052, 1054 (S.D.N.Y. 1978)).

182. *See* N.Y. CPLR 302 (McKinney Supp. 1988).

183. *See* *Simonson v. International Bank*, 14 N.Y.2d 281, 288, 200 N.E.2d 427, 431, 251 N.Y.S.2d 433, 438 (1964) ("although the section does not in terms refer to corporations, its application to foreign corporations, as well as to non-resident individuals, seems clear.").

184. *See* N.Y. CPLR 302 (McKinney 1972 & Supp. 1988).

185. *See* *Carlisle*, *supra* note 7, at 85-88 (citing *Sharrock v. Dell Buick-Cadillac*, 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978) (standing for the proposition that New York Constitution has a due process clause which the Court of Appeals has held may require more than its federal counterpart); *see also* *Svendsen v. Smith's Moving & Trucking Co.*, 54 N.Y.2d 865, 429 N.E.2d 411, 444 N.Y.S.2d 904 (1981)(same).

186. *See generally* WEINSTEIN, KORN & MILLER, *supra* note 86, at §§ 301-16.

187. *See* N.Y. CPLR 302(a) (McKinney 1972 & Supp. 1988).

188. *See id.*

189. *See id.*

190. *See* WEINSTEIN, KORN & MILLER, *supra* note 86, at § 302.06.

191. *See* *Adelona v. Webster*, 654 F. Supp. 968 (S.D.N.Y. 1987); *Barbera v. Smith*, 654 F. Supp. 386 (S.D.N.Y. 1987); *Barrett v. United States*, 646 F. Supp. 1345 (S.D.N.Y. 1986).

302 does not provide jurisdiction over a defendant in his individual capacity based on an agent's tortious act within the state unless the agent was representing the defendant in his individual capacity.<sup>192</sup> These cases indicate that while a formal agency relationship is unnecessary, courts will not liberally construe the term "agency" in order to assert jurisdiction over a nondomiciliary defendant.<sup>193</sup>

Most of the long-arm cases during this *Survey* year deal primarily with the CPLR 302(a)(1) "transaction of business" clause<sup>194</sup> and secondarily with CPLR 302(a)(3) which involves a tortious act outside New York causing injury within it.<sup>195</sup> The practitioner should also be aware of the Court of Appeals decision in *CPC International, Inc. v. McKesson Corp.*<sup>196</sup> where the Court qualified the "fiduciary shield doctrine" discussed in last year's *Survey*.<sup>197</sup>

#### *a. CPLR 302(a)(1): Transaction of Business Clause*<sup>198</sup>

In the context of CPLR 302(a)(1),<sup>199</sup> the transaction of business means purposeful activity in New York out of which a cause of action arises.<sup>200</sup> While a single act may constitute purposeful activity,<sup>201</sup> several decisions during the *Survey* year confirm that the term "transaction of business" is to be narrowly construed<sup>202</sup> and

192. See *Lee v. Carlson*, 645 F. Supp. 1430, 1434 (S.D.N.Y. 1986) ("There is no evidence, nor does the plaintiff allege, that any employee or tortfeasor at the MCC was acting as the personal rather than official agent of Carlson.").

193. See *id.* But see *Kreutter v. McFadden Oil Corp.*, 122 A.D.2d 614, 504 N.Y.S.2d 915 (4th Dep't 1986), *lv. to appeal granted*, 69 N.Y.2d 606 (1987) (to be discussed in next year's *Survey*).

194. See N.Y. CPLR 302(a)(1) (McKinney 1972 & Supp. 1988).

195. See N.Y. CPLR 302(a)(3)(ii) (McKinney 1972 & Supp. 1988).

196. 70 N.Y.2d 268, 514 N.E.2d 116, 519 N.Y.S.2d 804 (1987).

197. See *CPC Int'l*, 70 N.Y.2d at 287-88, 514 N.E.2d at 125-26, 519 N.Y.S.2d at 814; Carlisle, *supra* note 7, at 92. Also the Court of Appeals is expected to repudiate the fiduciary shield doctrine prior to the date of the *Survey's* publication. See *Kreutter v. McFadden Oil Corp.*, 122 A.D.2d 614, 504 N.Y.S.2d 915 (4th Dep't 1986), *lv. to appeal granted*, 69 N.Y.2d 606 (1987) (to be discussed in next year's *Survey*).

198. See N.Y. CPLR 302(a)(1) (McKinney 1972 & Supp. 1988).

199. See *id.*

200. In the context of CPLR 302(a)(1), the transaction of business involves purposeful activity in the forum, perhaps only a single act out of which a cause of action arises. This concept is to be distinguished from doing business which contemplates a whole complex of activities as discussed in *supra* notes 153-81 and accompanying text.

201. See *id.*

202. See *Standard Enterprises, Inc. v. Bag-It, Inc.*, 86-6746 (S.D.N.Y. Oct. 20, 1987) (telephone calls, invoices and one letter insufficient to establish jurisdiction under a 301(a)(1) analysis); *ACK Sports, Inc. v. Doug Wilson Enterprises*, 661 F. Supp. 386

that the claim arising out of that activity must bear a substantial relationship to it.<sup>203</sup> These cases support the Second Circuit Court of Appeals' recent opinion in *Fielder v. First City National Bank of Houston*,<sup>204</sup> where it was held that a nondomiciliary's two telephone calls and one mailing into New York did not constitute a transaction of business.<sup>205</sup> The Second Circuit stated "we must look at the totality of a defendant's contacts with the forum without regarding any single act as the sovereign talisman of jurisdiction."<sup>206</sup> The court distinguished *Parke-Bernet Galleries, Inc. v. Franklyn*,<sup>207</sup> and *C.T. Chemical (U.S.A), Inc. v. Houzens International, Inc.*,<sup>208</sup> on the grounds that in those cases the defendants had used the telephonic link to New York as a means of projecting themselves into local commerce.<sup>209</sup> The Second Circuit likened *Fiedler* to the "order solicitation" cases which hold that telephone orders not involving visits or consultations in New York do not confer personal jurisdiction under CPLR 302(a)(1).<sup>210</sup> Judge Sand reached a similar conclusion in *Metropolitan Air Service, Inc. v.*

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(S.D.N.Y. 1987) (Illinois hockey player's meetings in locker rooms and restaurants in New York with president of New York corporation did not qualify as a transaction of business for assertion of in personam jurisdiction under CPLR 302(a)(1)); *Talbot v. Johnson Newspaper Corp.*, 123 A.D.2d 147, 511 N.Y.S.2d 152 (3d Dep't 1987) (students attendance at college in New York does not constitute a transaction of business); *see also* *Cooperstein v. Pan-Oceanic Marine Inc.*, 124 A.D.2d 632, 507 N.Y.S.2d 893 (2d Dep't 1986) (telephone calls and mailing of loan papers to New York not enough to constitute a transaction of business).

203. *See id.*; *see also In re Estate of Bruno*, 126 A.D.2d 845, 510 N.Y.S.2d 770 (3d Dep't 1987) (citing *McGowan v. Smith*, 52 N.Y.2d 268, 272, 419 N.E.2d 321, 323, 437 N.Y.S.2d 643, 645 (1981) (for proposition that CPLR 302(a)(1) jurisdiction is not properly obtained unless a substantial relationship between the claim and the transaction in New York is established)).

204. 807 F.2d 315 (2d Cir. 1986) (applying the "totality of the defendant's activities within the forum" test).

205. *See Fielder*, 807 F.2d at 317.

206. *See id.*

207. 26 N.Y.2d 13, 256 N.E.3d 506, 308 N.Y.S.2d 337 (1970) (jurisdiction held proper over a California resident who participated in a New York art auction via telephone link with an agent of the auctioneer who then relayed defendant's bids).

208. 116 F.R.D. 518 (S.D.N.Y. 1985) (defendant established a telephonic course of dealing with the plaintiff-seller and traveled to New York to have lunch with the seller in order to discuss and negotiate the contract).

209. *See id.*

210. *See Fielder*, 807 F.2d 315; *see also* *M. Katz & Son Billiard Products, Inc. v. G. Correale & Sons, Inc.*, 20 N.Y.2d 903, 232 N.E.2d 864, 285 N.Y.S.2d 871 (1967); *L. F. Rothschild, Unterberg, Towben v. McTammey*, 89 A.D.2d 540, 452 N.Y.S.2d 630 (1982), *aff'd*, 59 N.Y.2d 651, 449 N.E.2d 1275, 463 N.Y.S.2d 197 (1983).

*Penbestky Aircraft*,<sup>211</sup> where the court held that under New York law a federal district court could not assert jurisdiction over an out-of-state principal based on the plaintiff agency's activities within the state when the principal's only contact with the agent was by telephone and telex.<sup>212</sup> Similarly, in *Berk v. Nemetz*<sup>213</sup> the federal district court held that the defendant's physical presence in New York on one brief occasion did not constitute a transaction of business.<sup>214</sup> The court stated that "[a]lthough it is certainly true that one of the most concrete manifestations of a nondomiciliary's purposeful activity in New York occurs when he physically comes to the state, it is hardly dispositive of the jurisdictional question under 302."<sup>215</sup>

Additionally, the court considered the "number and duration" of the defendant's visits to New York and the "purpose" of the visits.<sup>216</sup> Relying on *McKee Electric Co. v. Rauland-Borg, Corp.*,<sup>217</sup> and *George Reiner & Co. v. Schwartz*,<sup>218</sup> the court concluded that a single trip by Nemetz to New York for a meeting with the plaintiff failed to satisfy the requirements under CPLR 302.<sup>219</sup>

Once there has been a transaction of business, the claim must arise out of it.<sup>220</sup> At least one appellate division during the *Survey*

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211. See 648 F. Supp. 1153 (S.D.N.Y. 1986) (reviewing New York State cases recognizing jurisdiction where defendant's physical presence in state is lacking and concluding that jurisdictional assertions based on absent defendant require significant alternative contacts which must constitute more than the exchange of telexes and telephone calls with a New York plaintiff).

212. See *id.*

213. 646 F. Supp. 1080 (S.D.N.Y. 1986).

214. See *Berk*, 646 F. Supp. at 1084-85.

215. See *id.* at 1084.

216. See *id.*

217. 20 N.Y.2d 377, 229 N.E.2d 604, 283 N.Y.S.2d 34 (1967) (holding that defendant's activities did not confer jurisdiction upon the court even though at least three representatives of the defendant had made several visits to New York, each lasting several hours).

218. 41 N.Y.2d 648, 363 N.E.2d 551, 394 N.Y.S.2d 844 (1977) (one visit to New York enough for jurisdiction when it included interviewing, negotiating and contracting which resulted in a continuing relationship with a New York corporation).

219. See *Berk*, 646 F. Supp. at 1085. Contrast the court's decision in *Berk* with last year's *Survey* discussion of *Rates Technology, Inc. v. Diosio*, 626 F. Supp. 1295 (E.D.N.Y. 1986), where the court upheld jurisdiction based on one meeting in New York. See *Carlisle*, *supra* note 7, at 91-92.

220. See WEINSTEIN, KORN & MILLER, *supra* note 86, at § 302.02 (arising out of requirement usually not a problem when the action is for breach of contract negotiated in New York; however, if a plaintiff's claim involves injury out of New York, the negligence action is usually considered to be independent of any contract relationship between the parties).

year has reminded the practitioner that personal jurisdiction is not properly obtainable under CPLR 302(a)(1) "unless a substantial relationship between the claim and the transaction in New York is established."<sup>221</sup> Thus, in *In re Estate of Bruno*,<sup>222</sup> the Appellate Division, Third Department, found that although the nondomiciliary respondent had made 18 or 20 visits to his dying sister at a New York hospital, no relationship had been established between his visits to the decedent and the petitioners claim.<sup>223</sup>

b. CPLR 302(a)(3)<sup>224</sup>

CPLR 302(a)(3)<sup>225</sup> provides for an assertion of jurisdiction if the nondomiciliary commits an act out of state which causes injury to a person or his property within the state and one or more of the following conditions are met: (i) the defendant regularly does or solicits business in New York, or derives substantial revenue from goods used or services rendered here, or engages in any other persistent course of conduct here; or if these requirements are not met, (ii) the nondomiciliary defendant could have reasonably foreseen the New York consequences and derives substantial revenue from interstate or international commerce.<sup>226</sup>

CPLR 302(a)(3)(i)<sup>227</sup> was analyzed during the *Survey* year in *Lee v. Carlson*.<sup>228</sup> Judge Weinfeld held that a government defendant did not fall within the "persistent course of conduct in the state" prong of 302(a)(3)(i)<sup>229</sup> through the actions of his agents in New York because they represented him in his official rather than his individual capacity.<sup>230</sup> In *Cleopatra Kohliques, Inc. v. New High*

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221. See *In re Estate of Bruno*, 126 A.D.2d 845, 510 N.Y.S.2d 770 (3d Dep't 1987).

222. See *id.*

223. See *id.* at 846, 510 N.Y.S.2d at 771. The claim concerned petitioner's right of election against a joint bank account in Pennsylvania in respondent's and decedent's names with the right of survivorship. The appellate division stated: "No relationship has been established between respondent's visits to decedent and petitioner's claim. The joint account predated respondent's visits. Accordingly, no long-arm jurisdiction was ever acquired in this case." *Id.* at 846-47, 510 N.Y.S.2d at 772.

224. See Act of Sept. 1, 1966, ch. 590, 1966 McKinney's SESS. LAWS OF N.Y. 725 (codified at N.Y. CPLR 302(a)(3) (McKinney 1972 & Supp. 1988)).

225. See N.Y. CPLR 302(a)(3) (McKinney 1972 & Supp. 1988).

226. See *id.*

227. See N.Y. CPLR 302(a)(3)(i) (McKinney 1972 & Supp. 1988).

228. 645 F. Supp. 1430 (S.D.N.Y. 1986).

229. See N.Y. CPLR 302(a)(3)(i) (McKinney 1972 & Supp. 1988).

230. See *Lee*, 645 F. Supp. at 1434.



*Glass, Inc.*,<sup>231</sup> however, Judge Platt held that jurisdiction could be asserted under CPLR 302(a)(3)(ii) when a manufacturer made a fraudulent statement outside of New York that caused the plaintiff buyer to lose some of its New York customers.<sup>232</sup>

*C. Enforcement of a Foreign Judgment: Whose Law Determines Whether In Personam Jurisdiction was Properly Obtained*

What happens if a New Yorker, who manufactures noodle processing machines, receives a telephone call from the president of an Arizona corporation who inquires about the availability of a machine that would process an egg roll wrap and Oriental noodle?<sup>233</sup> Assume the New Yorker says: "I will be in Phoenix to attend a trade show next month—we can meet there to discuss the matter."<sup>234</sup> The New Yorker goes to Phoenix and engages in preliminary negotiations for the sale of a "mini-noodle cutter."<sup>235</sup> The Arizona purchaser flies to New York to inspect the merchandise and later the New Yorker sends a contract to him in Phoenix which he signs and returns by mail to Manhattan with a check for \$8,000.<sup>236</sup> The New Yorker cashes the check, collects its proceeds, and neglects to deliver the noodle cutter to Arizona.<sup>237</sup> Two weeks later, after being served with a summons and complaint by registered mail,<sup>238</sup> he hires you as his lawyer! Your detailed research indicates that under New York law the Arizona courts do not have a jurisdictional base.<sup>239</sup> If a default judgment is obtained in Arizona will it be entitled to full faith and credit in New York?<sup>240</sup> Yes sir!

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231. 652 F. Supp. 1254 (E.D.N.Y. 1987).

232. See *Cleopatra Kohlique*, 652 F. Supp. at 1254.

233. These facts are taken from *China Express, Inc. v. Volpi & Son Machine*, 126 A.D.2d 239, 513 N.Y.S.2d 388 (1st Dep't 1987).

234. See *id.* at 240, 513 N.Y.S.2d at 388.

235. See *id.* at 240, 513 N.Y.S.2d at 389.

236. See *id.*

237. See *id.* at 241, 513 N.Y.S.2d at 389.

238. See *id.*

239. See *Survey* year cases discussed *supra* notes 202-232 and accompanying text (supporting a conclusion that there would be no jurisdictional base in New York).

240. When a default judgment is obtained in a sister state, the plaintiff can move under CPLR 3213 for an accelerated judgment in lieu of complaint. If the courts of a sister state had jurisdiction the default judgment is entitled to full faith and credit in New York. See N.Y. CPLR 3213 (McKinney 1970).

In *China Express, Inc. v. Volpi & Son Machine, Corp.*,<sup>241</sup> the Appellate Division, First Department, held that where a sister state's exercise of long-arm jurisdiction is challenged in an action on a foreign judgment, the law of that state determines whether jurisdiction was properly asserted.<sup>242</sup> This is true even if that state's long-arm statute is at odds with our rule.<sup>243</sup> New York, unlike many states, has not chosen to extend its long-arm jurisdiction to the limits of constitutional tolerance.<sup>244</sup> Thus, if the long arm statute of a sister state does not violate constitutional safeguards, a default judgment rendered there can be enforced in New York. *China Express* warns the practitioner of the obvious. If you want to exercise your jurisdictional challenge and maintain your right to a full hearing on the merits, "Go West Young Man" for the challenge. If you default, you can exercise your challenge in New York but pursuant to the law of the foreign forum which will frequently be more expansive than CPLR 302.<sup>245</sup>

#### D. *Forum Non Conveniens*

Even if a New York court has jurisdiction over the subject matter of an action and over the person of the defendant, the court may decline to hear the case.<sup>246</sup> CPLR 327<sup>247</sup> permits a court to stay or dismiss any action if it finds that "in the interest of substantial justice the action should be heard in another forum."<sup>248</sup>

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241. 126 A.D.2d 239, 513 N.Y.S.2d 388 (1st Dep't 1987).

242. See *China Express*, 126 A.D.2d at 239, 513 N.Y.S.2d at 388.

243. See ARIZ. R. CIV. P. 4(e)(2). This Rule authorizes Arizona courts to assert bases over nonresident defendants who have "caused an event to occur in this state out of which the claim which is the complaint arose." *Id.* This statute is similar to but obviously broader than CPLR 302(a)(1) which provides for an assertion of bases over a nondomiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state." N.Y. CPLR 302(a)(1) (McKinney 1972 & Supp. 1988). Thus, if the Arizona long-arm statute does not violate state or federal due process requirements, then the default judgment in *China Express* is realized. See *China Express, Inc. v. Volpi & Son Mach. Corp.*, 126 A.D.2d 239, 513 N.Y.S.2d 388 (1st Dep't 1987).

244. See *China Express*, 126 A.D.2d at 242, 513 N.Y.S.2d at 389. "In that regard, we should note that New York, unlike Arizona, has not chosen to extend its long-arm jurisdiction to the limits of constitutional tolerance." *Id.*

245. For examples of states, other than Arizona, which have more expansive long-arm statutes than New York, see J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 139-47 (1985).

246. See N.Y. CPLR 329 (McKinney Supp. 1988).

247. *Id.*

248. *Id.*

Several *Survey* year opinions in this area demonstrate that our courts are frequently applying the statutory doctrine of *forum non conveniens* to dismiss cases.<sup>249</sup>

In *Rappaport v. Rose Robert Travel Bureau, Inc.*,<sup>250</sup> the plaintiff, a New Jersey resident, was injured when struck by an automobile driven by her husband who was also a New Jersey resident.<sup>251</sup> The accident occurred in the garage of their New Jersey home, and a New Jersey police officer, who was called to the scene, investigated the circumstances surrounding the accident.<sup>252</sup> The only connections that the case had with New York were the following: the automobile was owned by a New York corporation; the plaintiff underwent orthopedic surgery in New York; and the plaintiff was examined by a New York psychiatrist.<sup>253</sup> The Appellate Division, Second Department, relying on "all of the relevant factors,"<sup>254</sup> held that the trial term properly exercised its discretion in granting the defendant's motion for dismissal of the complaint pursuant to CPLR 327.<sup>255</sup> The Court of Appeals, in *Islamic Republic of Iran v. Pahlavi*,<sup>256</sup> listed the following factors for courts to consider when ruling on a CPLR 327 motion: "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which the plaintiff may bring suit."<sup>257</sup> The Court of Appeals further stated that a court may also consider that both parties to the action are nonresidents and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction.<sup>258</sup>

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249. See *Troni v. Banca Popolare Di Milano*, 129 A.D.2d 502, 514 N.Y.S.2d 246 (1st Dep't 1987); *Rappaport v. Rose Robert Travel Bureau, Inc.*, 129 A.D.2d 620, 514 N.Y.S.2d 255 (2d Dep't 1987); *VSL Corp. v. Dunes Hotel & Casinos, Inc.*, 128 A.D.2d 23, 515 N.Y.S.2d 12 (1st Dep't 1987), *rev'd*, 70 N.Y.2d 948, 519 N.E.2d 617, 524 N.Y.S.2d 671 (1988); see also *Atlantic Mut. Ins. Co. v. Cadillac Fairview US, Inc.*, 125 A.D.2d 181, 508 N.Y.S.2d 445 (1st Dep't 1986); *Moezinia v. Moezinia*, 124 A.D.2d 571, 507 N.Y.S.2d 716 (2d Dep't 1986); *Evdokias v. Oppenheimer*, 123 A.D.2d 598, 506 N.Y.S.2d 883 (2d Dep't 1986).

250. 129 A.D.2d 620, 514 N.Y.S.2d 255 (2d Dep't 1987).

251. See *Rappaport*, 129 A.D.2d at 621, 514 N.Y.S.2d at 255.

252. See *id.*, 514 N.Y.S.2d at 255-56.

253. See *id.*

254. See *id.*, 514 N.Y.S.2d at 256 (citing *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.2d 597 (1984), *cert. denied*, 469 U.S. 1108 (1985)).

255. See *id.*, 514 N.Y.S.2d at 255.

256. 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984).

257. *Pahlavi*, 62 N.Y.2d at 479, 467 N.E.2d at 248, 478 N.Y.S.2d at 600.

258. See *id.*; see also *Silver v. Great Amer. Ins. Co.*, 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972).

Two appellate divisions have given trial courts broad latitude when exercising their discretionary power under CPLR 327.<sup>259</sup> Thus, in both *Troni v. Banca Popolare di Milano*<sup>260</sup> and *Moezinia v. Moezinia*,<sup>261</sup> the fact that a party to the action resided in New York State did not prevent the trial courts from granting the defendants' CPLR 327 motions to dismiss.<sup>262</sup> Similarly, in *VSL Corp. v. Dunes Hotel and Casinos, Inc.*,<sup>263</sup> the Appellate Division, First Department, held that the New York domicile or residence of a party did not prevent the court from dismissing the plaintiff's complaint *sua sponte* on the ground of *forum non conveniens*.<sup>264</sup> *VSL Corp.* is a case of first impression and suggests that appellate courts will not hesitate to disregard the merits of a trial court's decision<sup>265</sup> and *sua sponte* dismiss a case whenever appropriate under the doctrine of *forum non conveniens*.<sup>266</sup> It should be noted, however, that the Court of Appeals has rejected this approach and

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259. See *Troni v. Banca Popolare di Milano*, 129 A.D.2d 502, 503, 514 N.Y.S.2d 246, 248 (1st Dep't 1987); *Moezinia v. Moezinia*, 124 A.D.2d 571, 572, 507 N.Y.S.2d 716, 717 (2d Dep't 1986).

260. 129 A.D.2d 502, 514 N.Y.S.2d 246 (1st Dep't 1987). The appellate division held that the trial court did not abuse its discretion in dismissing the complaint on *forum non conveniens* grounds. See *Troni*, 129 A.D.2d at 503, 514 N.Y.S.2d at 248. The trial court had considered the burden on New York courts, the interest of an alternative forum in deciding the issues, the need to translate documents from a foreign language, the need for interpretation of foreign law, and the fact that the lower court's dismissal permitted the plaintiff to file his suit in Italy. See *id.* at 503-04, 514 N.Y.S.2d at 248.

261. 124 A.D.2d 571, 507 N.Y.S.2d 716 (2d Dep't 1986). The appellate division affirmed the trial court's order dismissing the complaint on *forum non conveniens* grounds. See *Moezinia*, 124 A.D.2d at 571, 507 N.Y.S.2d at 716. All the events complained of took place in Iran. See *id.* at 572, 507 N.Y.S.2d at 717. Also, a key witness resided in France, and the plaintiff was a California resident. See *id.* Although the defendant resided in New York State, the Second Department, relying on the factors set forth in *Pahlavi*, held that under the totality of the circumstances a balancing of the equities did not favor the action being heard in a New York court. See *id.*; see also *supra* notes 255-58 and accompanying text.

262. See *Troni*, 129 A.D.2d at 503, 514 N.Y.S.2d at 247; *Moezinia*, 124 A.D.2d at 572, 507 N.Y.S.2d at 717.

263. 128 A.D.2d 23, 515 N.Y.S.2d 12 (1st Dep't 1987), *rev'd*, 70 N.Y.2d 948, 519 N.E.2d 617, 524 N.Y.S.2d 671 (1988).

264. See *VSL Corp.*, 128 A.D.2d at 26, 515 N.Y.S.2d at 14. The appellate division held that an action by a California construction corporation against a New York parent corporation based upon a construction agreement with a Nevada subsidiary would be dismissed *sua sponte* because the action had no substantial tie to New York. See *id.* at 27, 515 N.Y.S.2d at 15.

265. See *id.* at 25-26, 515 N.Y.S.2d at 14 (stating that "where, as here, an action which has only minimal contact with the State is instituted in New York, the court is not obliged to await the motion of counsel but may invoke the doctrine *sua sponte*.").

266. See *id.*

reversed the First Department's decision in *VSL Corp.*<sup>267</sup> In a terse memorandum opinion the Court held that:

The Appellate Division acted outside of its authority in *sua sponte* dismissing the complaint on *forum non conveniens* grounds. Under CPLR 327(a) a court may stay or dismiss an action in whole or in part on *forum non conveniens* grounds only upon the motion of a party; a court does not have the authority to invoke the doctrine on its own motion.<sup>268</sup>

The Court of Appeals decision is questionable for obvious reasons. Suppose lawyers in a sister state or foreign country come to New York to litigate and by agreement do not raise *forum non conveniens*. New York courts may be overwhelmed with this type of litigation.

Finally, the practitioner should note another important *Survey* year opinion. In *Carlenstolpe v. Merck & Co.*,<sup>269</sup> the United States Court of Appeals for the Second Circuit ruled for the first time that a federal district court's order denying a motion to dismiss a complaint on *forum non conveniens* grounds is not an appealable order under 28 U.S.C. § 1291.<sup>270</sup> Also, three *Survey* year decisions by the Federal District Court for the Southern District of New York confirm that, unlike state practice,<sup>271</sup> the availability of

267. See *VSL Corp. v. Dunes Hotels & Casinos, Inc.*, 70 N.Y.2d 948, 519 N.E.2d 617, 524 N.Y.S.2d 671 (1988).

268. See *id.* at 949, 519 N.E.2d at 617, 524 N.Y.S.2d at 671.

269. 819 F.2d 33 (2d Cir. 1987).

270. See *Carlenstolpe*, 819 F.2d at 36. The Third, Fifth, Sixth and District of Columbia Circuits have also ruled that district court orders denying motions to dismiss on *forum non conveniens* grounds are nonappealable. See *id.* at 33; see also *Partrederiet Treasure Saga v. Joy Mfg. Co.*, 804 F.2d 308 (5th Cir. 1986); *Rosenstein v. Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 352 (6th Cir. 1985); *Nalls v. Rolls Royce, Ltd.*, Nos. 82-1975, 82-1976, 82-2033, *reh'g denied*, 702 F.2d 255 (D.C. Cir.), *cert denied*, 461 U.S. 970 (1983); *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 790 F.2d 190 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983). The Fourth Circuit, however, has ruled that a district court order denying a motion to dismiss on *forum non conveniens* grounds is appealable. See *Kontoulas v. A.H. Robins Co.*, 745 F.2d 312 (4th Cir. 1984).

271. The New York State rule is set forth as follows:

Without doubt, the availability of another suitable forum is a most important factor to be considered in ruling on a motion to dismiss but we have never held that it was a prerequisite for applying the *conveniens* doctrine and in *Varkonyi* [*Varkonyi v. S.A. Empresa De Viacao Airea Reo Grandense (VARIG)*, 22 N.Y.2d 333, 338, 239 N.E.2d 542, 544, 239 N.Y.2d 670, 673 (1968)] we expressly described the availability of an alternative forum as a 'pertinent factor', not as a precondition to dismissal. . . . Nor should proof of the availability of another forum be required in all cases before dismissal is permitted. That would place an undue burden on New York courts forc-

an alternative forum is an absolute prerequisite for applying the doctrine to dismiss a complaint in federal court.<sup>272</sup>

*E. Statutory Requirements—Service of Summons*

Last year's *Survey* article reminded the practitioner that New York State courts require strict compliance for service of summons.<sup>273</sup> Decisional law during the current *Survey* year warrants that the admonition be repeated<sup>274</sup> because even the most minor defect in service of a summons can be fatal to the plaintiff.<sup>275</sup> This is true for the following reasons: one, a defect in service of the summons dismisses the action;<sup>276</sup> two, the dismissal frequently occurs after the original statute of limitations has expired;<sup>277</sup> and finally, the six-month grace period under CPLR 205(a) does not apply to actions dismissed on jurisdictional grounds.<sup>278</sup>

To avoid summons service challenges, the practitioner should always debrief his or her process server. Also, if the defendant raises a jurisdictional objection, serve a second summons and complaint for the same action. Let the defendant move to dismiss the complaint on the grounds that a prior action is pending. By doing so he must admit that the first action is not jurisdictionally defective.<sup>279</sup> With the foregoing advice in mind, several *Survey* year notice decisions are worthy of note.<sup>280</sup> In addition, service of sum-

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ing them to accept foreign-based actions unrelated to this State merely because a more appropriate forum is unwilling or unable to accept jurisdiction. . . . Moreover, even if we were to hold that the motion should be denied if no alternative forum is available, then the burden of demonstrating that fact should fall on plaintiff.

*Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 481, 467 N.E.2d 245, 249, 478 N.Y.S.2d 597, 601 (1984), *cert. denied*, 469 U.S. 1108 (1985).

272. See *Cruz v. Maritime Co. of Philippines*, 655 F. Supp. 1214 (S.D.N.Y. 1987); *ACLI Int'l Commodity Serv., Inc. v. Banque Populaire Suisse*, 652 F. Supp. 1289 (S.D.N.Y. 1987); *Hatzlachh Supply, Inc. v. Tradewind Airways, Ltd.*, 659 F. Supp. 112 (S.D.N.Y. 1987).

273. See *Carlisle*, *supra* note 7, at 93-99. The practitioner should contrast the strict compliance approach followed by New York State courts with the more liberal federal approach. See *Romandette v. Weetabix*, 807 F.2d 309, 311 (2d Cir. 1986) (stating that Rule 4 of the Federal Rules of Civil Procedure is to be liberally construed to further the purpose of finding personal jurisdiction in cases where the party has received actual notice).

274. See *infra* notes 286, 290, 297, 300-02, 313 and accompanying text.

275. See *Siegel*, *Civil Procedure*, 198 N.Y.L.J., Sept. 28, 1987, at s-24, col. 1.

276. See *id.*

277. See *id.*

278. See *id.*

279. See *id.*; see also *Yanni v. Chopp*, 130 A.D.2d 489, 515 N.Y.S.2d 72 (2d Dep't 1987).

280. See *infra* notes 286, 290, 297, 300-02, 313 and accompanying text.

mons under the Hague Convention merits review.<sup>281</sup>

### 1. *Service on a Natural Person*

Delivery of the summons under CPLR 308(1)<sup>282</sup> may be accomplished by personally delivering it to the defendant<sup>283</sup> or sometimes "by leaving it in the general vicinity of a person to be served who resists service."<sup>284</sup> Two Survey year opinions, however, limit the "general vicinity" exception.<sup>285</sup> In *Thermidor v. Wyckoff Heights Hospital*,<sup>286</sup> the plaintiff's process server delivered the summons and complaint to the defendant doctor's secretary outside of the defendant's presence.<sup>287</sup> The Appellate Division, Second Department, citing *Macchia v. Russo*,<sup>288</sup> held that the service of summons was not properly effected and thus the trial court lacked personal jurisdiction.<sup>289</sup> The Second Department reached the same result in *Selby v. Jewish Memorial Hospital*<sup>290</sup> where delivery of the summons was made to a doctor's receptionist who had stated that she was authorized to accept service.<sup>291</sup> The appellate division held that it was not shown that "the papers were left in the general vicinity of the defendant doctor" and that he was not "made aware of the fact and manner of service."<sup>292</sup> The Second Department also observed that service "could properly have been effected pursuant to CPLR 308(2) by the mailing of a copy of the summons and complaint to [defendant] at his residence."<sup>293</sup>

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281. See *infra* notes 335-50 and accompanying text.

282. See N.Y. CPLR 308(1) (McKinney 1972 & Supp. 1988).

283. See *id.*

284. *Id.*

285. See *Thermidor v. Wyckoff Heights Hosp.*, 130 A.D.2d 653, 515 N.Y.S.2d 583 (2d Dep't 1987); *Selby v. Jewish Memorial Hosp.*, 130 A.D.2d 651, 515 N.Y.S.2d 580 (2d Dep't 1987).

286. 130 A.D.2d 653, 515 N.Y.S.2d 583 (2d Dep't 1987).

287. See *Thermidor*, 130 A.D.2d at 653, 515 N.Y.S.2d at 583.

288. 67 N.Y.2d 592, 496 N.E.2d 680, 505 N.Y.S.2d 591 (1986) (where the Court of Appeals held that the delivery of a summons to the wrong person does not confer jurisdiction over a defendant even though he shortly thereafter receives it; a summons was delivered to the defendant's son outside the family house, and the son entered the house and gave the summons to the father).

289. See *Thermidor*, 130 A.D.2d at 653, 515 N.Y.S.2d at 583.

290. 130 A.D.2d 651, 515 N.Y.S.2d 580 (2d Dep't 1987).

291. See *Selby*, 130 A.D.2d at 651, 515 N.Y.S.2d at 581.

292. *Id.* at 652, 515 N.Y.S.2d at 581.

293. *Id.*, 515 N.Y.S.2d at 581-82.

## 2. *Leave and Mail*

CPLR 308(2)<sup>294</sup> permits service by leaving the papers with a person of suitable age and discretion at the actual place of abode of the defendant, and by mailing the summons to the defendant at his last known address or, as an alternative, to his actual place of business.<sup>295</sup> If one of the two steps is omitted, the service is invalid.<sup>296</sup>

The Court of Appeals issued its opinion in *Raschel v. Rish*<sup>297</sup> after last year's *Survey* article was submitted. In *Raschel*, the court held that when more than one defendant is served in the same action, by leaving the summons with a person of suitable age and discretion, a separate copy must be left for each defendant.<sup>298</sup> Thus, if a single summons naming a doctor and hospital as defendants is delivered to a hospital administrator, then jurisdiction will not be obtained over the defendant doctor.<sup>299</sup>

During the *Survey* year, the Appellate Division, Second Department, held that substituted service on a person with adverse interests to those of the respondent was not proper under CPLR 308(2).<sup>300</sup> Similarly, the Second Department held that a building security guard was not authorized to accept service for a physician who maintained an office in the building.<sup>301</sup> The Second Department also affirmed that neither the term "dwelling place" nor "usual place of abode" may be equated with the "last known residence" of a defendant for purposes of substituted service under

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294. N.Y. CPLR 308(2) (McKinney 1972 & Supp. 1988).

295. *See id.*

296. *See id.* It must also be noted that filing with the clerk of the court is necessary in order to effectuate service. *See id.*

297. 69 N.Y.2d 694, 504 N.E.2d 389, 512 N.Y.S.2d 22 (1986).

298. *See Raschel*, 69 N.Y.2d at 696-97, 504 N.E.2d at 390, 512 N.Y.S.2d at 24.

299. *See id.* (stating that although the administrator was qualified to accept service for the defendant doctor under CPLR 308(2), actual notice depended on the following contingencies: the Administrator had to know that service was being made on the doctor as well as on the hospital, had to notify the doctor, and had to furnish him with copies of the documents).

300. *See Community School Dist. No. 13 v. Goodman*, 127 A.D.2d 830, 511 N.Y.S.2d 945 (2d Dep't 1987) (holding that the service of process upon respondent, by leaving papers with the school superintendent, was improper in an article 78 proceeding brought by a school district against an employee).

301. *See Gottesman v. Lazansky*, 127 A.D.2d 563, 511 N.Y.S.2d 643 (2d Dep't 1987). The amendment to the CPLR 308(2) "cures the problems sharply raised" in this case. *See Barker, New York Practice*, 198 N.Y.L.J., Sept. 28, 1987, at 1, col. 1; *see also infra* notes 304-06.



CPLR 308(2).<sup>302</sup>

Several other appellate decisions, holding that the mailing of a summons to the defendant's place of employment is improper,<sup>303</sup> have been overruled by the Legislature's amendment to CPLR 308(2) which now permits the plaintiff to mail a copy of the summons to the defendant by first class mail to his actual place of business.<sup>304</sup> This is an alternative to the "last known address" rule, however, the mailing must be in an envelope marked "personal and confidential."<sup>305</sup> Also, the envelope may not indicate on the outside, by return address or otherwise, that it is from an attorney or relates to a legal action against the person served.<sup>306</sup>

### 3. *Service on Defendant's Agent*

CPLR 308(3)<sup>307</sup> permits service to be effected by delivery of the summons to an "agent designated under Rule 318."<sup>308</sup> Effective November 3, 1987, CPLR 318 was amended to provide that the writing in which the principal appoints his agent must be executed and acknowledged in the same manner as a deed.<sup>309</sup>

### 4. *Nail and Mail*

Last year's *Survey* warned the practitioner that service under CPLR 308(4)<sup>310</sup> is unusually hazardous because it requires proof of "due diligence" to make service under subsections (1) and (2) of Section 308.<sup>311</sup> While the "mail" requirements of CPLR 308(4)

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302. See *Chiari v. D'Angelo*, 123 A.D.2d 655, 507 N.Y.S.2d 26 (2d Dep't 1986).

303. See *Foley Machinery Co. v. Amaco Const. Corp.*, 126 A.D.2d 603, 511 N.Y.S.2d 40 (2d Dep't 1987); *Gottesman v. Lazansky*, 127 A.D.2d 563, 511 N.Y.S.2d 643 (2d Dep't 1987).

304. See Act of July 15, 1987, ch. 115, § 1, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 357-58 (codified at N.Y. CPLR 308(2) (McKinney Supp. 1988)).

305. See N.Y. CPLR 308(2) (McKinney 1972 & Supp. 1988).

306. See *id.*; see also *Barker, New York Practice*, 198 N.Y.L.J., Sept. 28, 1987, at 1, col. 1 (discussing the new provisions in CPLR 308(2) and (4) providing for mailing to the defendant's place of business).

307. See N.Y. CPLR 308(3) (McKinney 1972 & Supp. 1988).

308. See *id.*; see also *Gottesman v. Lazansky*, 127 A.D.2d 563, 564, 511 N.Y.S.2d 643, 645 (2d Dep't 1987).

309. See Act of July 15, 1987, ch. 115, § 1, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 357-58 (codified at N.Y. CPLR 308(3) (McKinney Supp. 1988)); see also *Donaldson v. Melville*, 124 A.D.2d 361, 507 N.Y.S.2d 301 (3d Dep't 1986) (agency must be express and not implied).

310. See N.Y. CPLR 308(4) (McKinney 1972 & Supp. 1988).

311. See *Carlisle, supra* note 7, at 97-98; see also *Farrell, Good Old Unreliable Service Under New York's Nail and Mail Statute*, 196 N.Y.L.J., July 28, 1986, at 1, col. 1.

have been expanded to include alternative mailing to the defendant's actual place of business,<sup>312</sup> the due diligence requirements continue to be rigidly construed. Thus, in *Smith v. Wilson*<sup>313</sup> the Appellate Division, Third Department, held that substituted service under subsection (4) was improper where the process server attempted to serve each of the two defendants on three separate occasions, none of which were on a weekend.<sup>314</sup> The Third Department stated:

The fact that the instant case presents a close question on the issue of due diligence was acknowledged by County Court when it concluded that plaintiffs complied with the standard of due diligence, but 'barely'. On the one hand, Orloff did attempt to serve each defendant at home outside normal working hours on one occasion. On the other hand, a total of only three attempts at personal service were made with respect to each defendant, none of these attempts was made on weekends and Orloff never made any inquires to determine defendants' whereabouts or their possible places of employment. . . . In light of the well-established policy of strictly observing the due diligence requirement and of scrutinizing the quality of the efforts made at personal service, we conclude that Orloff failed to exercise due diligence as a matter of law.<sup>315</sup>

##### 5. *Expedient Service*

Although CPLR 308(5)<sup>316</sup> does not require proof of due diligence or of actual prior attempts to serve a party under each and every method provided in CPLR 308,<sup>317</sup> the practitioner should continue to expect the "impracticable" requirements of subsection (5) to be strictly construed.<sup>318</sup>

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312. See N.Y. CPLR 308(4) (McKinney 1972 & Supp. 1988).

313. 130 A.D.2d 821, 515 N.Y.S.2d 146 (3d Dep't 1987)

314. See *Smith*, 130 A.D.2d at 822, 515 N.Y.S.2d at 147.

315. *Id.*

316. See N.Y. CPLR 308(5) (McKinney 1972 & Supp. 1988).

317. See *id.*

318. See *Saulo v. Noumi*, 119 A.D.2d 657, 501 N.Y.S.2d 95 (2d Dep't 1986) (expedient service authorized because plaintiff had attempted to personally deliver the summons to the defendant and thereafter made numerous inquiries as to his whereabouts).

## 6. Related Service Tips

CPLR 312<sup>319</sup> was amended to permit service on a board or commission of a town or village by delivering the summons to the clerk of the town or village.<sup>320</sup> Also, New York City's in rem foreclosure notice procedures do not require that a property owner receive personal notice of an in rem foreclosure unless the owner files a registration card with the New York City Department of Finance.<sup>321</sup> During the *Survey* year the Appellate Divisions for the First and Second Departments have issued conflicting decisions regarding the constitutionality of these notice requirements.<sup>322</sup> Also, the Appellate Division, Fourth Department, has held a similar procedure violates due process.<sup>323</sup> Leave to appeal has been granted for review of the Second Department's position.<sup>324</sup> Service under New York Vehicle and Traffic Law, section 253,<sup>325</sup> is not obtained by serving a summons on the Secretary of State if the plaintiff fails to include the defendant's out-of-state address.<sup>326</sup> Also, service is proper when a defendant is served within a courthouse, and therefore does not deprive a court of jurisdiction over housing owners

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319. See N.Y. CPLR 312 (McKinney 1972 & Supp. 1988).

320. See Act of June 8, 1987, ch. 109, § 1, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 338 (codified at N.Y. CPLR 312 (McKinney Supp. 1988)).

321. See N.Y.C. Admin. Code §§ 11-406, 11-417.

322. See *Alliance Property Management & Dev., Inc. v. Andrews Ave. Equities, Inc.*, 133 A.D.2d 30, 518 N.Y.S.2d 804 (1st Dep't), *aff'd*, 70 N.Y.2d 831, 517 N.E.2d 1327, 523 N.Y.S.2d 441 (1987) (affirming solely on the procedural grounds that the appellate division had the power to award the relief granted and the Court ruled on no other issues). The First Department voided these same notice requirements and found that publication notice to an unregistered property owner whose whereabouts were nevertheless readily ascertainable did not satisfy due process because the city had an obligation to give personal notice to all interested parties and not merely to those who requested such notice by filing registration cards. See *id.* at 31, 518 N.Y.S.2d at 508; see also *In re Tax Foreclosure No. 35*, 127 A.D.2d 220, 227, 514 N.Y.S.2d 390, 394 (2d Dep't 1987) (where the city acquired title to some land in Staten Island through an in rem foreclosure, and the property owner did not receive personal notice of the proceeding because he had failed to register with the city; publication notice in the City Record satisfied due process because the owner had waived his right to personal notice of the sale by failing to file a registration card).

323. See *East River Savings Bank v. Cerullo Motors, Inc.*, 134 Misc. 2d 699, 512 N.Y.S.2d 327 (Erie County Ct. 1987); see also *In re Foreclosure of Tax Liens by Erie County (Mfr. & Traders Trust Co.)*, 103 A.D.2d 636, 481 N.Y.S.2d 547 (4th Dep't 1984).

324. See *In re Tax Foreclosure No. 35*, 199 N.Y.L.J., Jan. 13, 1988, at 15, col. 1; see also *In re Tref Realty Co.*, 199 N.Y.L.J., Jan. 21, 1988, at 17, col. 3.

325. See N.Y. VEH. & TRAF. LAW § 253 (McKinney 1986 & Supp. 1988).

326. See *Adirondack Transit Lines, Inc. v. Lapazlia*, 128 A.D.2d 228, 515 N.Y.S.2d 668 (3d Dep't 1987).

served while in housing maintenance code proceedings.<sup>327</sup>

Finally, a criminal contempt proceeding can be commenced by substituted service instead of personal delivery.<sup>328</sup> In an issue of apparent first impression, the Appellate Term, First Department, held that personal service under CPLR 308(2)<sup>329</sup> was a sufficient jurisdictional predicate for criminal contempt.<sup>330</sup> The appellate term noted that there was no appellate case expressly holding that personal delivery of an order to show cause was the only permissible means of initiating a criminal contempt matter, or that statutory alternatives to in-hand delivery were jurisdictionally infirmed.<sup>331</sup> Although personal delivery of process is always preferable, "due process does not require it in a special proceeding . . . as long as the party charged is notified of the accusation and is afforded a reasonable time to defend."<sup>332</sup> Another case of apparent first impression is *Cascone v. Brennan*<sup>333</sup> where the Bronx County Civil Court determined that it had jurisdiction over a fifteen-year-old child defendant in a tort action even though service of process was made on his guardian father.<sup>334</sup>

## 7. *The Hague Convention*

First, count the number of automobiles in New York State with foreign license plates. Second, count the number of actions filed in New York State courts during the *Survey* year where a

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327. See *Department of Housing Preservation & Dev. v. Koenigsberg*, 133 Misc. 2d 893, 509 N.Y.S.2d 270 (N.Y.C. Civ. Ct., N.Y. Co. 1986). In a thoughtful opinion, Housing Judge Lewis R. Friedman held that valid reservice of process on the owners conferred jurisdiction notwithstanding the pendency of motions alleging defective original service. See *id.* at 896, 509 N.Y.S.2d at 272. Judge Friedman also held that the respondent owners were not immune from reservice while in court contesting the original service. See *id.* at 897-98, 509 N.Y.S.2d at 273.

328. See *Department of Housing Preservation & Dev. v. 24 West 132 Equities, Inc.*, No. 86-92738 (N.Y.C. Civ. Ct., N.Y. Co. Dec. 8, 1987).

329. See N.Y. CPLR 308(2) (McKinney 1972 & Supp. 1988).

330. See *Department of Housing Preservation & Dev. v. 24 West 132 Equities, Inc.*, No. 86-92738 (N.Y.C. Civ. Ct., N.Y. Co. Dec. 8, 1987). The practitioner should also note that personal delivery is not necessary for imposition of civil contempt. See *Lu v. Betancourt*, 116 A.D.2d 492, 496 N.Y.S.2d 754 (1st Dep't 1986) (personal delivery of an order to show cause is not necessary for civil contempt sanctions).

331. See *Department of Housing Preservation & Dev. v. 24 West 132 Equities, Inc.*, No. 86-92738 (N.Y.C. Civ. Ct., N.Y. Co. Dec. 8, 1987).

332. See *id.*

333. 134 Misc. 2d 417, 511 N.Y.S.2d 501 (N.Y.C. Civ. Ct., Bronx Co. 1987).

334. See *Cascone*, 134 Misc. 2d at 418, 511 N.Y.S.2d at 502.

defendant was a foreign national. Third, count the number of lawyers you know who have a copy of the Hague Convention. Fourth, if your answer to any of the preceding inquiries is more than one, read this section of the *Survey* carefully.

If a defendant in any action is a citizen of a country that is a signatory to the Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, an international treaty known as the Hague Convention,<sup>335</sup> then watch out! You may be required to make special efforts to comply with the Convention's service requirements.<sup>336</sup> The Hague Convention is purportedly designed to "simplify service of process abroad so as to ensure that documents are brought to the notice of the addressee in sufficient time."<sup>337</sup> The treaty allows signatory nations to ratify it subject to conditions or objections.<sup>338</sup> If a signatory nation has made any objections that would affect the method of service on its citizens or corporations, the New York lawyer should be aware of them,<sup>339</sup> particularly because two *Survey* year decisions reach conflicting results on how service of summons is accomplished under the Hague Convention.<sup>340</sup>

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335. See 20 U.S.T. 361, T.I.A.S. No. 6638, reprinted in Fed. R. Civ. P. 4, at 104-08 (West Supp. 1987)[hereinafter The Hague Convention].

336. See *id.*

337. *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 431 F. Supp. 1226, 1228 (N.D. Ill.), *aff'd*, 565 F.2d 1194 (7th Cir. 1977), *cert. denied*, 435 U.S. 905 (1978).

338. See The Hague Convention, *supra* note 335, at 105. Article 10 of the Hague Convention provides:

Provided the State of destination does not object, the present Convention shall not interfere with -

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

*Id.*

339. See *Russell v. Arthur Trask Co.*, 125 A.D.2d 136, 139, 512 N.Y.S.2d 575, 578 (3d Dep't 1987) (stating that it should be apparent from the trial record if the signatory State had made any objections to The Hague Convention); see also *Reynolds v. Koh*, 109 A.D.2d 97, 99, 490 N.Y.S.2d 295, 297 (3d Dep't 1985) ("Japan objected 'to the use of the methods of service referred to in subparagraphs (b) and (c) of article 10,' but not to the provision of article 10.").

340. See *Rissew v. Yamaha Motor Co.*, 129 A.D.2d 94, 515 N.Y.S.2d 352 (4th Dep't 1987); *Russell v. Arthur Trask Co.*, 125 A.D.2d 136, 139, 512 N.Y.S.2d 575, 578 (3d Dep't

In *Rissew v. Yamaha Motor Co.*,<sup>341</sup> the Appellate Division, Fourth Department, held that service of process on a Japanese corporation by mail pursuant to New York Business Corporation Law, section 307,<sup>342</sup> was permissible under the Hague Convention.<sup>343</sup> The Fourth Department, in *Rissew*, declined to follow a contrary holding by the Third Department found in *Reynolds v. Koh*.<sup>344</sup> During this *Survey* year, the Third Department followed *Reynolds* in *Russell v. Arthur Trask Co.*<sup>345</sup> although the court required that

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1987).

341. 129 A.D.2d 94, 515 N.Y.S.2d 352 (4th Dep't 1987).

342. See N.Y. BUS. CORP. LAW § 307 (McKinney 1986 & Supp. 1988).

343. See *Rissew*, 129 A.D.2d at 98-99, 515 N.Y.S.2d at 355. Plaintiff served defendant at its corporate headquarters in Japan pursuant to New York Business Corporation Law section 307. See *id.* at 96, 515 N.Y.S.2d at 353. He delivered a copy of the summons and complaint to the New York Secretary of State and mailed a copy to the defendant. See *id.* Ultimately, the plaintiff effected service under article 10 of the Hague Convention by sending copies to the Japanese Ministry of Foreign Affairs in Tokyo, but service was made after the applicable four-year statute of limitations under UCC section 2-275(1) had run. See *id.* at 96, 515 N.Y.S.2d 353-54. The issue was whether New York Business Corporation Law, section 307 service was authorized under The Hague Convention. See *id.* at 97, 515 N.Y.S.2d at 354. The Fourth Department held that article 10(a) of the Convention permitted such service. See *id.* at 98, 515 N.Y.S.2d at 355. The court rested its decision on its interpretation of the purpose of the Hague Convention, which was "to simplify service of process abroad so as to ensure that documents are brought to the notice of addressee in sufficient time." See *id.* at 97-98, 515 N.Y.S.2d at 354. The Fourth Department also observed that Japan, although objecting to subdivision (b) and (c) of Article 10, never objected to subdivision (a). See *id.* at 98, 515 N.Y.S.2d at 354.

344. See *id.* (citing *Reynolds v. Koh*, 109 A.D.2d 97, 490 N.Y.S.2d 295 (3d Dep't 1985)). In *Reynolds*, the plaintiffs brought a tort action against several defendants, including Nissan Motor Company who had manufactured the auto that plaintiffs were driving when they were injured in the auto accident. See *Reynolds*, 109 A.D.2d at 98, 490 N.Y.S.2d at 296. Plaintiffs served Nissan with an amended summons and complaint by registered mail, and delivered a copy to the New York Secretary of State under Business Corporation Law section 307. See *id.* Although the process was received, Nissan argued that service was still ineffective because plaintiffs had failed to serve them through the Japanese Minister for Foreign Affairs, as required by The Hague Convention. See *id.*, 490 N.Y.S.2d at 296-97. The Third Department held that service under New York Business Corporation Law section 307 was defective. See *id.* at 99, 490 N.Y.S.2d at 297. The court held that the word "send" rather than the words "serve or service" in article 10(a) did not authorize service, and concluded that because the plaintiffs had not satisfied the service requirements of The Hague Convention there was no jurisdiction over Nissan. See *id.* at 99-100, 490 N.Y.S.2d at 296-98. The appellate division stated that the law of Japan was incompatible with the law of New York, which provides for direct service by one litigant upon another, because under Japanese law service is the courts' responsibility. See *id.* at 100, 490 N.Y.S.2d at 298.

345. 125 A.D.2d 136, 512 N.Y.S.2d 575 (3d Dep't 1987) (following *Reynolds*, but remanding the case for further development of the record on question of whether Italy had made any objection to the Hague Convention that would affect the method of service on its citizens or corporations). On remand the third party defendant was served in accordance

the record before the trial court show whether the signatory state had made any objections to the Hague Convention that would effect service of process.<sup>346</sup>

Until the split in authority is clarified by the Court of Appeals, why gamble? Lawyers should rely on the Third Department's restrictive interpretation of the Hague Convention found in *Reynolds*.<sup>347</sup> Xerox a copy of the Convention articles from the United States Code Annotated, and check to be sure if service of process by postal channels is permitted under article 10(a).<sup>348</sup> If there is any doubt, then follow article 5 to determine if the service law of the foreign jurisdiction is compatible with the law of New York.<sup>349</sup> The practitioner should also be alert to the "interplay" between rule 4 of the Federal Rules of Civil Procedure and the Hague Convention, because several federal district courts in New York have reached conflicting conclusions as to whether service can be made on a foreign national pursuant to rule 4.<sup>350</sup> The conflicting approaches to the Hague Convention, on the state and federal levels, will have to be clarified by the New York Court of Appeals and by the United States Court of Appeals for the Second Circuit. Until then, the practitioner should "double check" when making service of process on a foreign national.<sup>351</sup>

#### IV. STATUTE OF LIMITATIONS

Of the many *Survey* year decisions interpreting and applying article II of the CPLR, the following should be of selective interest to the practitioner.

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with the Hague Convention. See Telephone interview with Professor Jay C. Carlisle and Robin Bartlett Phelan, Counsel for Arthur Trask Company (Dec. 21, 1987).

346. See *Russell*, 125 A.D.2d at 139, 512 N.Y.S.2d at 577.

347. See *supra* note 344-46 and accompanying text.

348. See The Hague Convention, *supra* note 335, at 105.

349. See *id.*

350. See Silverberg, *Civil Practice Roundup In Southern District*, 198 N.Y.L.J., Dec. 3, 1987, at 1, col. 1, (citing *Lana Mora Inc. v. S.S. Woermann Ulanga*, 672 F. Supp. 125 (S.D.N.Y. 1987) (holding that the Hague Convention "provides merely a mechanism for servicing process which is otherwise authorized, and is not an independent federal authorization for service abroad.")). But see *Cargill, Inc. v. M/V Paschalis*, No. 86-0805 (S.D.N.Y. Sept. 30, 1987) (holding that mail service outside the United States is not permitted by Rule 4 of the Federal Rules of Civil Procedure).

351. See *supra* notes 337-50 and accompanying text.

A. *Section 203(b)(5): Delivery to Sheriff or County Clerk*

The most common method of interposing a claim is by serving the summons upon the defendant.<sup>352</sup> Another method is by delivering the summons to the sheriff of an appropriate county for service upon the defendant.<sup>353</sup> When the action will be tried within the City of New York, the summons must be filed with the clerk of a specified county.<sup>354</sup> This provision is useful when the applicable limitations period is about to run and the defendant cannot be located or served quickly because it extends the time period within which the defendant must be served by sixty days.<sup>355</sup>

Traditionally, New York courts have liberally interpreted the service and filing requirements of CPLR 203(b)(5),<sup>356</sup> but several decisions during the *Survey* year suggest that the statute is being more restrictively interpreted.<sup>357</sup> In *Petrone v. S.S.K.S. Restaurant Corp.*,<sup>358</sup> the Appellate Division, Second Department, held that the plaintiff's application for a preference, which resulted in the summons ending up in the files of the county clerk, was not a filing for purposes of CPLR 203 (b).<sup>359</sup> The same appellate division held in another case that the plaintiff's failure to file papers in the county listed on the summons as being the defendant's address prevented the 60-day tolling provision from taking effect.<sup>360</sup> The Second De-

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352. See N.Y. CPLR 203(b)(1) (McKinney 1972 & Supp. 1988).

353. See N.Y. CPLR 203(b)(5) (McKinney 1972 & Supp. 1988).

354. See *id.*; D. SIEGEL, *NEW YORK PRACTICE*, § 47 (Supp. 1987) A summons is not filed with the clerk of the county where the action will be brought, but with the clerk of the county where the individual or corporate defendant resides. See N.Y. CPLR 203(b)(5) (McKinney 1972 & Supp. 1988). The county in which the claim arose is an alternative but only if the plaintiff cannot determine with due diligence where the individual defendant resides. See *id.* The corporate defendant may be served in the county of its residence, in the county where it does business, or where the cause of action arose. See *id.*

355. See N.Y. CPLR 203(b)(5) (McKinney 1972 & Supp. 1988).

356. See *id.*

357. See *Bellamund v. Beth Israel Hosp.*, 131 A.D.2d 796, 517 N.Y.S.2d 161 (2d Dep't 1987); *Petrone v. S.S.K.S. Restaurant Corp.*, 125 A.D.2d 654, 510 N.Y.S.2d 178 (2d Dep't 1986); *Nelson v. Downstate Medical Center*, 135 Misc. 2d 980, 517 N.Y.S.2d 354 (Sup. Ct., Kings Co. 1987); see also *Raschel v. Rish*, 69 N.Y.2d 694, 504 N.E.2d 389, 512 N.Y.S.2d 22 (1986).

358. 125 A.D.2d 654, 510 N.Y.S.2d 178 (2d Dep't 1986).

359. See *Petrone*, 125 A.D.2d at 655-56, 510 N.Y.S.2d at 179.

360. See *Bellamund v. Beth Israel Hosp.*, 131 A.D.2d 796, 517 N.Y.S.2d 161 (2d Dep't 1987). But see *Woll v. Raffa*, 124 A.D.2d 726, 508 N.Y.S.2d 474 (2d Dep't 1986) (where the court rejected appellant's contentions that CPLR 203(b)(5) was not operable because appellant's actual place of residence and business was in Kings County and plaintiff had filed the summons and complaint in Queens County, because the plaintiff fulfilled the purpose of the



partment stated that "[s]ince CPLR 203(b)(5) requires, inter alia, that the summons be filed in the county in which the defendant 'resides, is employed or doing business,' the plaintiffs failure to file the summons in New York County prevented the statutory 60-day tolling provision from taking effect."<sup>361</sup>

The Kings County Supreme Court also held, in *Nelson v. Downstate Medical Center*,<sup>362</sup> that the plaintiff must make a "reasonable inquiry" as to where the defendant resides, and that it is not enough to check the yellow pages under "physicians."<sup>363</sup> In that case, the plaintiff should have used an investigator or telephoned the attorneys for the defendants to ascertain their whereabouts.<sup>364</sup>

Finally, in a related matter the Court of Appeals held in *Raschel v. Rish*,<sup>365</sup> that the statute of limitations was not tolled as against a doctor by service on a hospital in the absence of a showing that the hospital and doctor were united in interest by evidence of the doctor's employment rather than his mere affiliation with the hospital.<sup>366</sup>

#### B. Section 203(e): The Relation Back Doctrine<sup>367</sup>

During last year's *Survey* year the appellate divisions liberally

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statute by filing the papers in the county of defendant's last known place of business after making reasonable inquiry to determine his actual whereabouts).

361. *Bellamund*, 131 A.D.2d at 797, 517 N.Y.S.2d at 162.

362. 135 Misc. 2d 980, 517 N.Y.S.2d 354 (Sup. Ct., Kings Co. 1987).

363. *See Nelson*, 135 Misc. 2d at 986, 517 N.Y.S.2d at 358.

364. *See id.* (stating that "CPLR 203 subd.(b) par. 5 requires reasonable inquiry not minimal inquiry.").

365. 69 N.Y.2d 694, 504 N.E.2d at 389, 512 N.Y.S.2d 22 (1986).

366. *See Raschel*, 69 N.Y.2d at 697, 504 N.E.2d at 390-91, 512 N.Y.S.2d at 23-4. "Here, however, there was no showing of the doctor's employment by the hospital; nor was there any showing that plaintiff had sought care directly from the hospital rather than from the doctor himself." *Id.*, 504 N.E.2d at 391, 512 N.Y.S.2d at 24. The Court of Appeals held that service of one copy of the summons and complaint upon the hospital was not sufficient absent a showing that the administrator knew that he was accepting service on behalf of the doctor and had reason to notify him of the same. *See id.* at 696-97, 504 N.E.2d at 390, 512 N.Y.S.2d at 23; *see also* *Manufacturers & Traders Trust Co. v. Lindauer*, 135 Misc. 2d 132, 513 A.D.2d 629 (Sup. Ct., Cattaraugus Co. 1987) (holding that the wife was not "united in interest" with her co-borrower husband in respect to the bank's action on a credit card and, therefore, could assert a defense of statute of limitations in a later action for summary judgment when she was not served in the first matter).

367. N.Y. CPLR 203(e) (McKinney 1972 & Supp. 1988)

construed CPLR 203(e)<sup>368</sup> to permit amendment of pleadings. Although most of this year's *Survey* decisions permit amendments in general,<sup>369</sup> courts have been reluctant to allow the addition of claims that would otherwise be barred by the statute of limitations.<sup>370</sup> For example, in *Laudico v. Sears, Roebuck and Co.*,<sup>371</sup> the Appellate Division, Fourth Department, held that a wife's loss of services claim could not be allowed to relate back to the earlier pleading that asserted her husband's claim.<sup>372</sup> Similarly, in *Clark v. Turner Construction Co.*,<sup>373</sup> the Appellate Division, Second Department, held that an employee could not amend her claim to al-

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368. See *id.* (providing that added claims in amendments permitted by leave of court are timely unless the original claim did not give notice of the transactions or occurrences to be proved).

369. See *Cutwright v. Central Brooklyn Urban Dev. Corp.*, 127 A.D.2d 731, 512 N.Y.S.2d 128 (2d Dep't 1987) (leave to amend granted by the appellate division in a fraud action); *Getz v. Getz*, 130 A.D.2d 710, 516 N.Y.S.2d 26 (2d Dep't 1987) (leave granted in a matrimonial action); *Hopper v. Hise*, 131 A.D.2d 814, 517 N.Y.S.2d 178 (2d Dep't 1987) (leave granted in a dental malpractice action); *Shepherd v. New York City Transit Auth.*, 129 A.D.2d 574, 514 N.Y.S.2d 72 (2d Dep't 1987) (leave granted in a personal injury action); *McKinney v. Bay Ridge Medical Group*, 126 A.D.2d 711, 511 N.Y.S.2d 123 (2d Dep't 1987) (leave granted in a medical malpractice action); *Stephan v. Shulman*, 130 A.D.2d 484, 515 N.Y.S.2d 67 (2d Dep't 1987) (leave granted in an action seeking accounting of partnership profits); *Powe v. City of Albany*, 130 A.D.2d 484, 514 N.Y.S.2d 725 (3d Dep't 1987) (leave granted to assert statute of limitations as a defense in an action to recover damages for the demolition of a building); *Nab-Tenn Constructors v. City of New York*, 123 A.D.2d 571, 507 N.Y.S.2d 146 (1st Dep't 1986) (motion to amend denied but without prejudice).

370. See *Laudico v. Sears Roebuck & Co.*, 125 A.D.2d 960, 510 N.Y.S.2d 787 (4th Dep't 1986); *Clark v. Turner Constr. Co.*, 130 A.D.2d 454, 515 N.Y.S.2d 33 (2d Dep't 1987); *Zavetta v. Portelli*, 127 A.D.2d 760, 512 N.Y.S.2d 152 (2d Dep't 1987); see also *Thompson v. Pittman*, 123 A.D.2d 683, 506 N.Y.S.2d 979 (2d Dep't 1986) (where the original pleadings did not give notice of the claims sought to be added by amendment, the new complaint was time barred); *Shairo v. Schoninger*, 122 A.D.2d 38, 504 N.Y.S.2d 199 (2d Dep't 1986) (no notice in original pleadings bars complaint). But see *State v. St. James Nursing Home*, 128 A.D.2d 694, 513 N.Y.S.2d 195 (2d Dep't 1987) (where the original complaint notified defendants that the State's claims were based on certain financial reports, the court permitted the claims asserted in the amended complaint that were based on the same reports).

371. 125 A.D.2d 960, 510 N.Y.S.2d 787 (4th Dep't 1986). After filing the note of issue and statement of readiness, plaintiff moved to add his wife as a party plaintiff together with her cause of action for loss of services. See *Laudico*, 125 A.D.2d at 960, 510 N.Y.S.2d at 787. The appellate division held that his wife's cause of action was time-barred when plaintiff sought to amend and the trial court properly denied his request. See *id.* at 961, 510 N.Y.S.2d at 788. The court held that pursuant to CPLR 203(e) the cause of action would not relate back to the time the action was commenced on the grounds that the wife was not a prior participant in the action, and the prior pleadings gave defendants no notice that the wife would be asserting a claim. See *id.*

372. See *id.* at 961, 510 N.Y.S.2d at 787.

373. 130 A.D.2d 454, 515 N.Y.S.2d 33 (2d Dep't 1987).

lege that she lost control of her vehicle and sustained further injuries because of injuries resulting from the original accident.<sup>374</sup> Also, in *Zaveta v. Portelli*,<sup>375</sup> the Second Department held that CPLR 203(e) did not apply to save the plaintiff's claim asserted against a third-party defendant after the expiration of the applicable statute of limitations.<sup>376</sup> This was true even though the third-party defendant had received notice of the circumstances underlying plaintiff's proposed amended claim prior to expiration of the statute of limitations.<sup>377</sup> The message is clear; don't expect to use CPLR 203(e) to revive a dead claim unless you can definitely show that the amendment will not prejudice your adversary.<sup>378</sup>

### C. CPLR 214-a: Exceptions to the General Rule<sup>379</sup>

Medical, dental, and podiatric malpractice actions are governed by CPLR 214-a<sup>380</sup> which requires actions to be brought within two years and six months of the act or omission at issue.<sup>381</sup> This year's exception cases include those involving the discovery of foreign objects,<sup>382</sup> the continuous treatment doctrine,<sup>383</sup> fraudulent concealment,<sup>384</sup> and equitable estoppel.<sup>385</sup>

At least one appellate court agrees with last year's *Survey*,

374. See *Clark*, 130 A.D.2d at 455, 515 N.Y.S.2d 33 (where the motion for leave to serve further amended complaint was made nearly three years after the injuries were sustained).

375. 127 A.D.2d 760, 512 N.Y.S.2d 152 (2d Dep't 1987).

376. See *Zaveta*, 127 A.D.2d at 761, 512 N.Y.S.2d at 153 (stating that even where a third-party defendant receives notice of the circumstances surrounding plaintiff's claim, contained in the amended complaint, prior to expiration of the applicable statute of limitations by a third-party action against it, plaintiff is not allowed to circumvent the time bar).

377. See *id.* at 761, 512 N.Y.S.2d at 154 (stating that although CPLR 1009 permits a plaintiff to amend his complaint without leave of court to assert any claim that the plaintiff has against a third party defendant, this provision does not relieve a plaintiff from the operation of the statute of limitations).

378. See D. SIEGEL, NEW YORK PRACTICE § 237 (1978).

379. N.Y. CPLR 214-a (McKinney Supp. 1988).

380. *Id.*

381. See *id.*

382. See *Mitchell v. Abitol*, 130 A.D.2d 906, 515 N.Y.S.2d 810 (2d Dep't 1987); *Sternberg v. Gardstein*, 120 A.D.2d 93, 508 N.Y.S.2d 14 (2d Dep't 1986).

383. See *Bobrow v. DePaulo*, 655 F. Supp. 685 (S.D.N.Y. 1987); *Malavenda v. New York Telephone Co.*, 127 A.D.2d 452, 512 N.Y.S.2d 110 (1st Dep't 1987); *Fox v. Glens Falls Hosp.*, 129 A.D.2d 955, 515 N.Y.S.2d 118 (3d Dep't 1987).

384. See *Szajna v. Rand*, 131 A.D.2d 840, 517 N.Y.S.2d 201 (2d Dep't 1987).

385. See *Ettore I. v. Angela D.*, 127 A.D.2d 6, 513 N.Y.S.2d 733 (2d Dep't 1987); *Thompson v. Whitestone Sav. & Loan Ass'n*, 131 A.D.2d 749, 516 N.Y.S.2d 963 (2d Dep't 1987).

which suggested that intrauterine devices ("IUDs") qualify in some trial courts for the foreign object exception rule.<sup>386</sup> In *Sternberg v. Gardstein*,<sup>387</sup> the Appellate Division, Second Department, held that an IUD became or took on the character of a foreign object when the defendant performed an abortion and tubal ligation sterilization procedure but negligently failed to remove the IUD.<sup>388</sup> The plaintiff's medical malpractice action therefore accrued when the IUD was or could reasonably have been discovered by the patient.<sup>389</sup> In *Mitchell v. Abitol*,<sup>390</sup> however, the Second Department held that a medical malpractice claim based solely on an allegation that a wrong suturing method and material were used did not bring the action within the ambit of the foreign exception rule.<sup>391</sup>

The continuous treatment doctrine continues to be restrictively applied by New York Courts.<sup>392</sup> In *Fox v. Glens Falls Hospital*,<sup>393</sup> the Appellate Division, Third Department, held that a patient's return to the hospital emergency room five days after her

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386. See Carlisle, *supra* note 7, at 104 n.344.

387. 120 A.D.2d 93, 508 N.Y.S.2d 14 (2d Dep't 1986). The Second Department deserves kudos for this thoughtful opinion. In November of 1979, an IUD was inserted into plaintiff by a nonparty physician. See *Sternberg*, 120 A.D.2d at 94, 508 N.Y.S.2d at 15. On February 13, 1981, defendant agreed to perform an abortion on the plaintiff and to remove the IUD. See *id.* During the operation on March 2, 1981, defendant did not remove the IUD. See *id.* On November 1, 1983, plaintiff commenced a personal injury action to recover damages caused by the IUD which defendant negligently failed to remove. See *id.* at 95, 508 N.Y.S.2d at 15. Defendant sought a dismissal on the grounds that the action was barred by CPLR 214-a and argued that the foreign object exception did not apply. See *id.* The appellate division held that the exception was applicable and that the plaintiff's malpractice claims accrued on the date she discovered or should have discovered the IUD. See *id.* at 97, 508 N.Y.S.2d at 17.

388. See *id.* The appellate division noted that it had previously held that the failure of a physician to remove an IUD upon the implantation of a second IUD was a "fact pattern appropriate for the application of the foreign object rule set forth in CPLR 214-a." *Id.* at 95, 508 N.Y.S.2d at 16, (citing *Darragh v. County of Nassau*, 63 A.D.2d 1010, 405 N.Y.S.2d 1020 (2d Dep't 1978), *aff'g*, 91 Misc. 2d 53, 397 N.Y.S.2d 553 (Sup. Ct., Nassau Co. 1977)). The appellate division then concluded that the *Darragh* decision was indistinguishable from the *Sternberg* fact pattern for "while the defendant did not insert a second IUD, he did provide an alternative means of contraception." *Id.* at 97, 508 N.Y.S.2d at 16..

389. See *id.* at 97, 508 N.Y.S.2d at 17.

390. 130 A.D.2d 633, 515 N.Y.S.2d 810 (2d Dep't 1987).

391. See *Mitchell*, 130 A.D.2d at 633-34, 515 N.Y.S.2d at 810-11 (holding that the suture material was a "fixation device placed intentionally within the body" and could not therefore be considered a foreign object, citing *Goldsmith v. Howmedica, Inc.*, 67 N.Y.2d 120, 491 N.E.2d 1097, 500 N.Y.S.2d 640 (1986)).

392. See Carlisle, *supra* note 7, at 103 (stating that courts during the 1986 *Survey* year restrictively read CPLR 214-a when applying the continuous treatment doctrine).

393. 129 A.D.2d 955, 515 N.Y.S.2d 118 (3d Dep't 1987).

initial discharge was continuous treatment.<sup>394</sup> The court, however, held that her subsequent return to the hospital nearly two and one-half years later constituted a resumption of treatment rather than a continuation thereof.<sup>395</sup> Similarly, in *Bobrow v. DePaulo*,<sup>396</sup> Judge Leval held that independent checkups for detection of breast cancer did not constitute a continuous course of treatment and could not be linked together to toll the statute of limitations.<sup>397</sup> Also, in *Malavenda v. New York Telephone Co.*,<sup>398</sup> the Appellate Division, First Department, held that CPLR 214-a could not be tolled because the plaintiff had failed to meet her burden of showing that the defendant was more than an independent contractor.<sup>399</sup>

The doctrines of fraudulent concealment and equitable estoppel are applied by courts to prevent a defendant from raising a time bar if it would be inequitable for the defendant to do so.<sup>400</sup> They cannot be applied, as a matter of law, unless a plaintiff is able to establish the necessary elements for the assertion of each doctrine.<sup>401</sup> In *Szajna v. Rand*,<sup>402</sup> the Appellate Division, Second Department held that because the record before the trial court contained disputed allegations pertaining to the issue of fraudulent concealment, an award of summary judgment would be inappropriate.<sup>403</sup> In *Thompson v. Whitestone Sav. & Loan Association*,<sup>404</sup> the

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394. See *Fox*, 129 A.D.2d at 956, 515 N.Y.S.2d at 120.

395. See *id.*, 515 N.Y.S.2d at 119 (stating that the "continuous nature of a diagnoses does not itself amount to continuous treatment.").

396. 655 F. Supp. 685 (S.D.N.Y. 1987).

397. See *Bobrow*, 655 F. Supp. at 687. (stating that the continuous treatment requires more than merely a continuous physician-patient relationship).

398. 127 A.D.2d 542, 512 N.Y.S.2d 110 (1st Dep't 1987).

399. See *Malavenda*, 127 A.D.2d at 543, 512 N.Y.S.2d at 111. An employee brought an action against a radiologist who had read mammograms in connection with the employer's breast screening program. See *id.* The appellate division held that the statute of limitations was not tolled absent a showing that the radiologist was more than an independent contractor. See *id.*

400. See *infra* notes 406-07 and accompanying text.

401. See *Ettore I. v. Angela D.*, 127 A.D.2d 6, 513 N.Y.S.2d 733 (2d Dep't 1987); *Szajna v. Rand*, 131 A.D.2d 840, 517 N.Y.S.2d 201 (2d Dep't 1987); *Thompson v. Whitestone Sav. & Loan Ass'n*, 131 A.D.2d 749, 516 N.Y.S.2d 963 (2d Dep't 1987).

402. 131 A.D.2d 840, 517 N.Y.S.2d 201 (2d Dep't 1987)

403. See *Szajna*, 131 A.D.2d at 841, 517 N.Y.S.2d at 202 (stating that the "plaintiff has raised triable issues of fact as to whether the Statute of Limitations should be tolled by virtue of the defendants' fraudulent concealment of plaintiff's injuries and the plaintiff's consequent reliance upon his representations and advice").

404. 131 A.D.2d 749, 516 N.Y.S.2d 963 (2d Dep't 1987).

Second Department concluded that the trial court properly refused to apply the doctrine because the plaintiffs failed to establish the necessary elements of equitable estoppel.<sup>405</sup>

Thus, parties wishing to assert these doctrines should follow the lead of the Court of Appeal's decision in *Simcusi v. Saeli*.<sup>406</sup> An estoppel argument must state facts upon which there is a factual dispute as to whether the defendant's acts, however innocent, were reasonably relied upon by the plaintiff who did not sue until the otherwise applicable time period had run.<sup>407</sup> For fraudulent concealment, the plaintiff must prove that he justifiably relied upon the defendant's intentional misrepresentation and then prosecute the claim with due diligence after learning of the concealment.<sup>408</sup>

#### D. CPLR 217: When is a Four-Month Time Period Applicable?<sup>409</sup>

Last year's *Survey* discussed, for the first time, some of the 1986 decisions interpreting CPLR 217.<sup>410</sup> This provision set a four-month time limitation in a proceeding against a body or officer after the determination becomes binding or final upon the petitioner.<sup>411</sup> Several appellate division opinions during the *Survey* year demonstrate that there continues to be confusion on both the bar and the bench as to when the period is applicable and when it begins to run.<sup>412</sup> In *Save the Pine Bush, Inc. v. City of Albany*,<sup>413</sup>

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405. See *Thompson*, 131 A.D.2d at 750, 516 N.Y.S.2d at 965; see also *Green v. Abbott Laboratories*, 198 N.Y.L.J., Nov. 17, 1987, at 17, col. 2 (Sup. Ct., N.Y. Co.) (rejecting the plaintiff's arguments that the DES manufacturers should be equitably estopped from asserting the statute of limitations where the industry allegedly concealed facts about the link between their product and cancer, but plaintiff had not specified the allegedly concealed facts and had not presented evidence of any manufacturer's wrongful acts).

406. 44 N.Y.2d 442, 377 N.E.2d 713, 406 N.Y.S.2d 259 (1978).

407. See *Simcusi*, 44 N.Y.2d at 449, 377 N.E.2d at 716, 406 N.Y.S.2d at 262.

408. See *id.* at 451, 377 N.E.2d at 718, 406 N.Y.S.2d at 264.

409. See N.Y. CPLR 217 (McKinney 1972 & Supp. 1988).

410. See Carlisle, *supra* note 7, at 104-05.

411. See *id.*; see also N.Y. CPLR 217 (McKinney 1972 & Supp. 1988).

412. See *Burrell v. Ortiz*, 128 A.D.2d 391, 512 N.Y.S.2d 677 (1st Dep't 1987); *Dionisio v. Board of Educ.*, 128 A.D.2d 524, 512 N.Y.S.2d 458 (2d Dep't 1987); *Waterside Assoc. v. New York State Dep't of Environmental Conservation*, 127 A.D.2d 663, 511 N.Y.S.2d 890 (2d Dep't 1987); *People ex rel. Miranda v. Kuhlman*, 127 A.D.2d 924, 511 N.Y.S.2d 981 (3d Dep't 1987); *Vasbinder v. Hartnett*, 129 A.D.2d 894, 514 N.Y.S.2d 530 (3d Dep't 1987); *Kurland v. McLaughlin*, 122 A.D.2d 947, 505 N.Y.S.2d 967 (2d Dep't 1986); see also *Calvest v. Westchester Co. Personnel Office*, 128 A.D.2d 523, 512 N.Y.S.2d 456 (2d Dep't 1987) (ad-

the Court of Appeals held the enactment of a city ordinance to be administrative and not legislative.<sup>414</sup> The four-month statute under article 78<sup>415</sup> was applied, therefore, and not the six-year provision applicable to declaratory judgments or injunctions.<sup>416</sup> It is often difficult to determine what sort of remedy to pursue, therefore, particularly when a citizen perceives a municipal wrong. One commentator suggests that serious thought be given to making article 78<sup>417</sup> the only remedy available against a government body for challenged actions.<sup>418</sup>

### *E. CPLR 214-c: Revivor Statute Challenged*<sup>419</sup>

Last year's *Survey* discussed the revival of time-barred claims in cases of exposure to DES, tungsten-carbide, asbestos, chlordane, and polyvinyl chloride.<sup>420</sup> The one year revival period has ex-

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ministrative determination becomes final and binding under CPLR 217 on the date it becomes effective); *Bardou v. Town of North Dansville*, 134 Misc. 2d 927, 513 N.Y.S.2d 584 (Sup. Ct., Livingston Co. 1987) (date upon which applications of town for urban development action grant became final is the date upon which the applications were executed by the town supervisors).

413. 70 N.Y.2d 193, 512 N.E.2d 526, 518 N.Y.S.2d 943 (1987).

414. See *Save the Pine Bush*, 70 N.Y.2d at 204-05, 512 N.E.2d at 530, 518 N.Y.S.2d at 947.

415. N.Y. CPLR 7801-06 (McKinney Supp. 1988)

416. See *id.*; see also *People ex rel. Miranda v. Kuhlmann*, 127 A.D.2d 924, 511 N.Y.S.2d 981 (3d Dep't 1987). In *Miranda*, the petitioner instituted a habeas corpus proceeding seeking an immediate release from prison. See *Miranda*, 127 A.D.2d at 926, 511 N.Y.S.2d at 983. The supreme court converted the proceeding to an article 78 proceeding and dismissed it on the ground that it was time-barred. See *id.* at 927, 511 N.Y.S.2d at 983. A disciplinary determination made in 1972 resulted in the loss to petitioner of 180 days of good time and in 1986, the time allowance committee effectuated the loss of such time thus prolonging petitioner's period of incarceration. See *id.* at 928, 511 N.Y.S.2d at 984. Petitioner subsequently sought a writ of habeas corpus; the appellate division affirmed the lower court, holding that a collateral attack on the disciplinary determination which had resulted in petitioner's loss of good time must be obtained by way of an article 78 proceeding, and is thus subject to the four-month limitation period of CPLR 217. See *id.* at 927, 511 N.Y.S.2d at 983. The court further stated that language in the governing regulations that a loss of good time is tentative until the recommended loss affects consideration for parole or conditional release, does not render the 1972 disciplinary determination non-final. See *id.* at 928, 511 N.Y.S.2d at 984.

417. See N.Y. CPLR 7801-06 (McKinney 1981 & Supp. 1988).

418. See *Barker*, *New York Practice*, N.Y.L.J., Sept. 28, 1987, at 1, col. 1.

419. See N.Y. CPLR 214-c (McKinney Supp. 1988).

420. See *Carlisle*, *supra* note 7, at 69-74 (discussing newly enacted CPLR 214-c and warning the practitioner to expect the constitutionality of the revivor statute to be challenged).

pired.<sup>421</sup> Constitutional challenges to the statute, however, were made during the *Survey* year.<sup>422</sup>

In *Hymowitz v. Eli Lilly and Company*<sup>423</sup> a state supreme court justice upheld the constitutionality of CPLR 214-c.<sup>424</sup> The defendants had challenged the revival statute on equal protection and due process grounds arguing that the statute was the result of an arbitrary and irrational political arrangement without rational guidelines, scientific certainty, or public necessity.<sup>425</sup> The defendants also argued that the legislative concern for limiting the number of potential claimants and costs was not related to the objective of the legislation, which was to allow victims of latent injuries to maintain actions.<sup>426</sup> One defendant contended, furthermore, that before the constitutionality of the revival statute could be determined, further discovery was necessary on the question of whether or not such extraordinary circumstances existed to justify invocation of the statute.<sup>427</sup> In a well-reasoned opinion, Justice Gammernan held that the revival statute had a reasonable relationship with the legislative purpose of providing "a forum for innocent victims who might otherwise be time-barred before becoming aware of their injuries."<sup>428</sup> According to the court:

As a general rule, state statutes of limitation reviving time barred actions are not violative of due process. Statutes of limitation re-

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421. *Id.* The one-year period began running on July 30, 1986. See Act of July 30, 1986, ch. 682, 1986 MCKINNEY'S SESS. LAWS OF N.Y. 1567 (codified at N.Y. CPLR 214-c (McKinney 1987)); see also *Piccirelli v. Johns Manville Sales Corp.* 128 A.D.2d 762, 513 N.Y.S.2d 469 (2d Dep't 1987). In this action alleging negligence and strict products liability, plaintiff sought to recover damages for injuries resulting to his exposure to asbestos. See *Piccirelli*, 128 A.D.2d at 762, 513 N.Y.S.2d at 469. The Appellate Division, Second Department, held that the action, which was time barred as of July 30, 1986, was revived pursuant to the provisions of chapter 682. See *id.* at 763, 513 N.Y.S.2d at 470; see also Act of July 30, 1986, ch. 682, 1986 MCKINNEY'S SESS. LAWS OF N.Y. 1565 (codified at N.Y. CPLR 5041-49 (McKinney 1987)). Plaintiff's last exposure to the asbestos was 14 years prior to the commencement of the action. See *Piccirelli*, 128 A.D.2d at 762, 512 N.Y.S.2d at 469.

422. The principal challenge is *Hymowitz v. Eli Lilly & Co.*, 136 Misc. 2d 482, 518 N.Y.S.2d 996 (Sup. Ct., N.Y. Co. 1987). It should also be noted that on the same day the *Hymowitz* decision was issued, the same court upheld plaintiffs' cause of action despite their inability to identify which DES products caused the injuries. See *Tigue v. E.R. Squibb & Sons, Inc.*, No. M-4231, slip op. (1st Dep't Dec. 1, 1987).

423. 136 Misc. 2d 482, 518 N.Y.S.2d 996 (1987).

424. See N.Y. CPLR 214-c (McKinney Supp. 1987)

425. See *Hymowitz*, 136 Misc. 2d at 493, 518 N.Y.S.2d at 1002.

426. See *id.* at 484, 518 N.Y.S.2d at 998.

427. See *id.* at 485, 518 N.Y.S.2d at 999.

428. *Id.* at 486, 518 N.Y.S.2d at 1000.



present a public policy statement with respect to the privilege to litigate. [T]he history of pleas of limitations shows them to be good only by legislative grace and to subject to a relatively large degree of legislative control. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1944). The expiration of the applicable time period does not eliminate a cause of action but rather, suspends the court's power to grant a remedy. In other words, statutes of limitations relate to the availability of a remedy and not to the destruction of any fundamental right.<sup>429</sup>

On appeal to the Appellate Division, First Department, the appellants made three fundamental challenges to the revival statute:<sup>430</sup> first, that the reopener is, on its face, an unconstitutional exercise of legislative power;<sup>431</sup> second, that it is unconstitutional as applied to any claim that the plaintiff could have brought under the old statute of limitations but chose not to bring;<sup>432</sup> and finally, that section 12,<sup>433</sup> which deprives the defendant manufacturers of the five targeted substances of the benefit of CPLR article 16,<sup>434</sup> is an unconstitutional discrimination against those companies.<sup>435</sup> It is highly likely that the appellate division will uphold the constitutionality of the revivor statute and also uphold the theory that drug manufacturers are liable even though they are not identified as the makers of the specific pills taken by the plaintiff.

In a related matter,<sup>436</sup> a state supreme court justice refused to expand the one-year revival statute to include actions for wrongful death that were viable at the time of the decedent's death.<sup>437</sup> While acknowledging that "the legislative design may work an injustice in this case,"<sup>438</sup> Justice Gammerman ruled that "it would be

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429. *Id.* at 485, 518 N.Y.S.2d at 999.

430. See Brief of Defendant Eli Lilly & Co. (Preliminary Statement) (copy on file at Syracuse Law Review, Syracuse Univ. College of Law).

431. See *id.*

432. See *id.*

433. See *id.*; see also N.Y. CPLR 1201-11 (McKinney Supp. 1988)

434. See Brief of Defendant Eli Lilly & Co. (Preliminary Statement); see also N.Y. CPLR 1601-03 (McKinney Supp. 1988)

435. See *supra* note 430 and accompanying text. This argument is based on the fact that revision of the rules of joint liability do not pertain to suits revived under CPLR 214-c(4). See Act of July 30, 1986, ch. 682, 1986 MCKINNEY'S SESS. LAWS OF N.Y. 1567 (codified at N.Y. CPLR 214-c (McKinney 1987)).

436. See *Green v. Abbott Laboratories*, 198 N.Y.L.J., Nov. 17, 1987, at 13, col. 2 (Sup. Ct., N.Y. Co.).

437. See *id.*

438. See *id.*

improper to judicially extend the revival provisions as it relates to wrongful death claims.”<sup>439</sup> Justice Gammernan also rejected the plaintiff’s arguments that the DES manufacturers should be equitably estopped from asserting the statute of limitations.<sup>440</sup> It should be noted that a supreme court justice has refused to permit defendants in a products liability action pending for almost ten years to take advantage of newly enacted 214-c<sup>441</sup> and win dismissal of claims based upon a new discovery rule pertaining to injuries caused by exposure to harmful substances.<sup>442</sup>

### F. Miscellaneous

During the *Survey* year, some other decisions emerged that merit at least brief mention.

#### 1. *Federal Night Depository Box: General Rule 1(a) for the Southern District*

In *Greenwood v. State of New York Office Of Mental Health*,<sup>443</sup> a psychiatrist brought a federal civil rights action against the State of New York.<sup>444</sup> The claim was subject to the three-year statute of limitations for general personal injury claims.<sup>445</sup> Federal procedural rules require that district courts be deemed open for filing pleadings twenty-four hours each day.<sup>446</sup> Judge Leisure held that the plaintiff’s action was not “commenced” for limitations purposes on the date his complaint was placed in a night depository box maintained by the clerk of the court.<sup>447</sup> Instead, placement was only effective to commence the action on the following day by which time the action was time barred!<sup>448</sup> Judge Leisure based his decision on General Rule 1(a) of the Southern District of New York which provides that papers

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439. *Id.*

440. *See id.*

441. N.Y. CPLR 214-c (McKinney 1987).

442. *See O’Halloran v. Toledo Scales, Co.*, \_\_\_ A.D.2d \_\_\_, 524 N.Y.S.2d 666 (1st Dep’t 1988), *aff’g*, 135 Misc. 2d 1098, 517 N.Y.S.2d 1003 (Sup. Ct., N.Y. Co. 1987) (the action was not controlled by the new and liberalized statute of limitations period).

443. 645 F. Supp. 111 (S.D.N.Y. 1986).

444. *See Greenwood*, 645 F. Supp. at 113.

445. *See id.* at 115.

446. FED. R. Crv. P. 77(a).

447. *See Greenwood*, 645 F. Supp. at 114.

448. *See id.*

submitted after business hours in the night depository box will be considered to have been filed as of 8:30 a.m. the following business day.<sup>449</sup> This decision is on appeal and should be reversed by the Second Circuit.

## 2. CPLR 215(3): As Applied by Federal Courts<sup>450</sup>

In *Von Bulow By Auersperg v. Von Bulow*,<sup>451</sup> Judge Walker held that a malicious prosecution action arising out of criminal proceedings in Rhode Island was barred by CPLR 215(3).<sup>452</sup> Judge Walker noted that the action should have been brought within one year from the date on which the claim first accrued.<sup>453</sup> Since a malicious prosecution action first accrues after a plaintiff receives a favorable final determination in the prior legal proceeding, the date it was rendered forms the basis of the action.<sup>454</sup> Judge Walker reminded the practitioner that federal courts applying New York State law should also apply New York's statute of limitations provision.<sup>455</sup>

## 3. Toll by Reason of Insanity

One result of the appellate divisions' power to make factual determinations is that it can reverse the trial court and find a person "insane" under CPLR 208<sup>456</sup> for the purposes of tolling a statute of limitations.<sup>457</sup> The test is whether a person is "unable to manage his business affairs and estate and to comprehend and protect his own legal rights and liabilities because of an overall ability

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449. See *id.* Judge Leisure found that rule 77(a) of the Federal Rules of Civil Procedure does not specify the date on which papers should be considered filed if deposited at the courthouse after regular hours. See *id.* at 113. He also reasoned that the drafters of the federal rules intended rule 77 to be read in conjunction with General Rule 1(a) of the Southern District. See *id.* at 116. *Greenwood* is on appeal before the Court of Appeals for the Second Circuit (86-7926). Your author predicts that the Second Circuit will reverse and remand the case to the district court prior to the *Survey's* publication.

450. See N.Y. CPLR 215(3) (McKinney 1972).

451. 657 F. Supp. 1134 (S.D.N.Y. 1987).

452. See *Von Bulow*, 657 F.Supp. at 1136 (citing N.Y. CPLR 215(3) (McKinney 1972)).

453. See *id.* at 1138.

454. See *id.*

455. *Id.* at 1138 (citing *Stafford v. International Harvester*, 668 F.2d 142, 147 (2d Cir. 1981)); see also *Bank of Boston v. Arguello Tefel*, 626 F. Supp. 314, 315 (E.D.N.Y. 1986).

456. N.Y. CPLR 208 (McKinney Supp. 1988).

457. See *Yannon v. R.C.A.*, 131 A.D.2d 843, 517 N.Y.S.2d 205 (2d Dep't 1987).

to function in society.”<sup>458</sup>

#### 4. Notice of Claim Provisions

Some limitations of time are not true statutes of limitations, but are in actuality conditions precedent. They require the plaintiff to do an act other than commencing the action prior to the expiration of a stated period of time.<sup>459</sup> When the required act is the filing of a notice of claim, the plaintiff must plead and prove compliance with the condition precedent.<sup>460</sup> Because there is no comprehensive compilation of conditions precedent available,<sup>461</sup> the practitioner must ascertain in each case whether one applies. When one does, the practitioner should be aware that there will be an applicable statute of limitations in addition to the notice requirement.<sup>462</sup> In this respect, the New York Court of Appeals has held that the notice of claim requirement of General Municipal Law 50-e<sup>463</sup> applies to a federal civil rights claim, whether the claim is based on section 1981<sup>464</sup> or 1983<sup>465</sup> of the United States Code. Although *Survey* year decisions by at least two appellate di-

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458. *Id.* at 845, 517 N.Y.S.2d at 206-07.

459. *See, e.g.,* Becker v. City of New York, 131 A.D.2d 413, 516 N.Y.S.2d 225 (2d Dep’t 1987) (the plaintiff had to allege that the city commissioner of transportation had received written notice of a pothole).

460. *See id.*; *see also* Halperin v. City of New York, 127 A.D.2d 461, 511 N.Y.S.2d 273 (1st Dep’t 1987) (plaintiff had to prove prior knowledge of an inoperative traffic signal).

461. Perry Pazer, a former president of the New York State Trial Lawyers Association, states there are nearly 400 applicable time limitations between notices of claim and various statutes of limitations in New York State. *See* N.Y.S.T.L.A. Bill of Particulars (Sept.-Oct. 1987). He also refers the practitioner to a listing prepared by attorney Bert Bauman of statutes of limitations significant to the New York City area. *See id.*

462. In an action against the City of New York, for example, a notice of claim must be filed within 90 days, N.Y. GEN. MUN. LAW 50(e) (McKinney 1986), while a summons in a personal injury action must be filed within one year and 90 days, and a summons for wrongful death within two years. *See* N.Y. EPTL 5-5.1 (McKinney 1987). The same time periods apply in actions against the Transit Authority and the New York City Health and Hospitals, except wrongful death actions for the latter two must be filed within one year and 90 days for the Transit Authority. *See id.*; *see also* N.Y. PUB. AUTH. LAW § 1212 (McKinney 1987). Practitioners would be well advised to join the New York State Trial Lawyers’ Association and obtain a copy of Bert Bauman’s statutes of limitations list.

463. *See* N.Y. GEN. MUN. LAW § 50(e) (McKinney 1986).

464. *See* Mills v. County of Monroe, 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 709 (1983); *see also* Goodman v. Lukens Steel Co., 107 S. Ct. 2617 (1987).

465. *See* 423 S.Salina St., Inc. v. City of Syracuse, 68 N.Y.2d 474, 503 N.E.2d 63, 510 N.Y.S.2d 507 (1986).

visions<sup>466</sup> and one federal district court<sup>467</sup> demonstrate that courts are liberally construing notice of claim requirements, the practitioner should be careful to comply with them.<sup>468</sup>

### 5. *Federal Superfund Amendment*

Last year's *Survey* mentioned the Superfund and Reauthorization Act of 1986.<sup>469</sup> The Act establishes an accrual rule for claims brought under state law for damages from exposure to any hazardous substance, pollutant or contaminant released into the environment.<sup>470</sup> The federal statute governs many actions brought after December 11, 1980.<sup>471</sup> It should be noted that important limitations in the coverage of the Superfund Amendment are found in the Act's definitions section.<sup>472</sup>

### 6. *Statute of Limitations: Extension In Actions Against Non-domiciliary Corporations*

On November 2, 1987, the United States Supreme Court agreed to decide whether a state may extend its statute of limitations to allow suits that would otherwise be untimely against out-of-state corporations.<sup>473</sup> The case grew out of a contract with a chemical plant in Ohio, and is limited to the extent that corporations have avoided subjecting themselves to the state's jurisdiction before the normal limitations period has run.<sup>474</sup>

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466. See *Halperin v. City of New York*, 127 A.D.2d 461, 511 N.Y.S.2d 273 (1st Dep't 1987); *Becker v. City of New York*, 131 A.D.2d 413, 516 N.Y.S.2d 225 (2d Dep't 1987).

467. See *Piesco v. City of New York Dep't of Personnel*, 650 F. Supp. 896 (S.D.N.Y. 1987).

468. See generally, D. SIEGEL, *NEW YORK PRACTICE* § 35 (Supp. 1987).

469. See Carlisle, *supra* note 7, at 72 n.29 (citing Superfund Amendments and Reauthorization Act of 1986, No. 99-499, 100 Stat. 1613 (1986)).

470. See *id.*

471. See 42 U.S.C. § 9658 (1982)

472. See *id.* "Relevant release into environment" is defined to exclude emissions from engine exhausts of motor vehicles and aircraft release of federally regulated nuclear material and the common application of fertilizer. See 42 U.S.C. § 9601(2) (1982). In addition exposure to products intended for consumer use are excluded. See *id.*

473. See *Bendix Autolite, Corp. v. Midwesco Enterprises*, 820 F.2d 186 (6th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3320 (U.S. Nov. 2, 1987) (No. 87-367).

474. See *id.*

## V. MOTIONS

The practitioner knows the importance of motion practice under CPLR 3211<sup>475</sup> and 3212<sup>476</sup>. Your author often wonders, in fact, if the *Survey* piece should be entitled "Motion Practice" with designated subdivisions relating to jurisdiction, statute of limitations, res judicata, etc. Instead, he continues the *Survey* tradition of integrating article 31 and 32 cases into other subject areas.<sup>477</sup>

The number of CPLR 3211 and 3212 cases decided by New York State courts during the *Survey* year is impressive.<sup>478</sup> The most important one is a short memorandum opinion by the Court of Appeals in *Addesso v. Shemtob*.<sup>479</sup> Professor Siegel has already analyzed the *Addesso* case twice.<sup>480</sup> It is important, however, to remind the practitioner of the obvious. Defendants seeking to take advantage of jurisdictional challenges must rigidly abide by the requirements of CPLR 3211(e).<sup>481</sup> If a motion is made, it is important to include jurisdiction as a ground. If an answer is interposed without making a motion, be certain to include the jurisdictional objection in it. As Professor Siegel states, the Court of Appeals is "warning the bar to stop being careless with the subject of jurisdiction."<sup>482</sup>

Additional *Survey* year motion practice cases which are worthy of mention include *Yanni v. Chopp*,<sup>483</sup> *Montgomery Ward Co. v. Othmer*,<sup>484</sup> and *Jeraci v. Froehlich*.<sup>485</sup> In *Yanni*, the Appellate Division, Second Department, held that where counsel for the de-

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475. N.Y. CPLR 3211 (McKinney 1987) (motion to dismiss).

476. N.Y. CPLR 3212 (McKinney 1987) (motion for summary judgment).

477. Your author is always grateful for advice and suggestions made by *Survey* readers. A good number of my New York Practice students insist that the course should be renamed Motion Practice Under the CPLR as well.

478. See WEINSTEIN, KORN & MILLER, *supra* note 86, at art. 32 (Supp. 1987).

479. 70 N.Y.2d 689, 512 N.E.2d 314, 518 N.Y.S.2d 793 (1987). Plaintiff filed complaint and defendant moved to dismiss it for failure to state a cause of action. See *Addesso*, 70 N.Y.2d at 690, 512 N.E.2d at 315, 518 N.Y.S.2d at 794. Plaintiff amended complaint to cure the defect and defendant then raised a jurisdictional objection to serve in his amended answer. See *id.* The Court of Appeals held that objection should have been raised in the first motion. See *id.*

480. See Siegel, *Civil Practice*, 198 N.Y.L.J., Sept. 28, 1987, at 23-24, col. 1; see also Stein, *New York Court of Appeals Roundup*, N.Y.L.J., Sept. 10, 1987, at 1, col. 1.

481. N.Y. CPLR 3211(e) (McKinney 1987).

482. Siegel, *Civil Practice*, 198 N.Y.L.J., Sept. 28, 1987, at 24, col. 1.

483. 130 A.D.2d 489, 515 N.Y.S.2d 72 (2d Dep't 1987).

484. 127 A.D.2d 913, 512 N.Y.S.2d 273 (3d Dep't 1987).

485. 129 A.D.2d 557, 514 N.Y.S.2d 53 (2d Dep't 1987).

fendants conceded validity of service of process in a request for dismissal of an action in a second county, defendants were equitably estopped from contesting jurisdiction or raising the defense of statute of limitations in an action filed in the first county.<sup>486</sup> In *Montgomery Ward*, the Appellate Division, Third Department, held that two lawsuits emanating from a common transactional occurrence is not in and of itself enough to dismiss the state court action on the ground that another claim is pending between the parties for the same cause of action in federal court.<sup>487</sup> In *Jeraci*, the Appellate Division, Second Department, held that the defendant's claim that he had never received responses to discovery demands was not sufficient to rebut the presumption flowing from facially proper affidavits to service by mail.<sup>488</sup>

The practitioner should also be alerted to a split of authority on the notice required before a motion under CPLR 3211(a)<sup>489</sup> can be converted to a motion for summary judgment. The Appellate Division, First Department, has held that the notice must come from the court.<sup>490</sup> The Second Department, on the other hand, concludes that the notice may come from one of the parties in the form of a request to the court to convert the original motion.<sup>491</sup>

## VI. DISCLOSURE

Of the many disclosure decisions rendered during the *Survey* year, the following areas should be of interest to the practitioner.

### A. CPLR 3101(d)<sup>492</sup>

CPLR 3101(d)<sup>493</sup> was amended in 1985 to liberalize discovery relating to trial experts. It contains two numbered paragraphs.<sup>494</sup> Paragraph 1 requires, upon request, the prompt disclosure of the

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486. See *Yanni*, 130 A.D.2d at 496, 515 N.Y.S.2d at 74.

487. See *Montgomery Ward*, 127 A.D.2d at 913, 512 N.Y.S.2d at 273.

488. See *Jeraci*, 129 A.D.2d at 558, 514 N.Y.S.2d at 54.

489. See N.Y. CPLR 3211(a) (motion to dismiss).

490. See *Four Seasons Hotels Ltd. v. Vinnik*, 127 A.D.2d 310, 515 N.Y.S.2d 1 (1st Dep't 1987).

491. See *Reed v. Shoratlantic Development Co.*, 121 A.D.2d 525, 503 N.Y.S.2d 840 (2d Dep't 1986).

492. See N.Y. CPLR 3101 (McKinney Supp. 1988).

493. See Act of July 1, 1985, ch. 294, 1985 MCKINNEY'S SESS. LAWS OF N.Y. 688 (codified at N.Y. CPLR 3101(d) (McKinney Supp. 1988)).

494. See *id.*

name, qualifications, and expected testimony of any expert a party anticipates calling at trial.<sup>495</sup> Medical, dental, and podiatric experts are exempt from this provision.<sup>496</sup> Paragraph 2 is addressed to materials subject to disclosure.<sup>497</sup>

In *Landmark Insurance Co. v. Beau Rivage Restaurant*,<sup>498</sup> the Appellate Division, Second Department, held that investigation reports of experts retained by an insurer were not material prepared for litigation, and were therefore subject to disclosure unless the insurer had previously issued a disclaimer of coverage or had made a firm decision to do so.<sup>499</sup> That view comports with the policy of liberal disclosure under CPLR 3101(a).<sup>500</sup> It has received a mixed following in other *Survey* year decisions involving the application of material protected from disclosure under subsection (2) of CPLR 3101(d).<sup>501</sup>

Another area of controversy concerns the special exception in subparagraph (1) of CPLR 3101(d) for medical, dental, and podiatric malpractice cases.<sup>502</sup> Although the actual name of the expert can be concealed, revealing the experts "qualifications" if they tend to facilitate his identification may be problematic.<sup>503</sup> In *Pizzi v. Muccia*,<sup>504</sup> the Appellate Division, Third Department, held that in appropriate cases a court could strike a request for qualifications when it is demonstrated that the experts identity would be revealed.<sup>505</sup> The Court denied plaintiffs motion to strike, however,

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495. *See id.*

496. *See id.*

497. *See id.*

498. 121 A.D.2d 98, 509 N.Y.S.2d 819 (2d Dep't 1986).

499. *See Landmark Ins.*, 121 A.D.2d at 101, 509 N.Y.S.2d at 823.

500. *See* N.Y. CPLR 3101(a) (McKinney Supp. 1988).

501. *See id.* 3101(d)(2); *see also* Crowe-Crimmins-Wolff v. Munier, 126 A.D.2d 696, 507 N.Y.S.2d 428 (2d Dep't 1986) (reports relating to allegedly defective diesel engines discoverable under 3101(d)); Crowe v. Lederle Laboratories, 125 A.D.2d 875, 510 N.Y.S.2d 228 (3d Dep't 1986) (report prepared by manufacturer's professional medical services department was discoverable by plaintiff because it was prepared not only for litigation but to monitor products claims). *But see* Wallace v. Benedictine Hospital, 124 A.D.2d 433, 507 N.Y.S.2d 533 (3d Dep't 1986) (material not discoverable); DiNova v. Sunnyview Hosp., 135 Misc. 2d 961, 517 N.Y.S.2d 410 (Sup. Ct., Rensselaer Co. 1987) (insurer's file not subject to discovery); Gentile v. Wakeel, 135 Misc. 2d 301, 514 N.Y.S.2d 878 (Sup. Ct., Oneida Co. 1987) (reports prepared by a private investigator retained by the defendant's liability insurer were exempt from disclosure).

502. *See* N.Y. CPLR 3101(d)(1) (McKinney Supp. 1988).

503. *See id.*

504. 127 A.D.2d 338, 515 N.Y.S.2d 341 (3d Dep't 1987).

505. *See Pizzi*, 127 A.D.2d at 340, 515 N.Y.S.2d at 343; *see also* McGoldrick v. W. M.



because they did not meet their burden under CPLR 3103<sup>506</sup> of showing how the identities would be revealed.<sup>507</sup> The Appellate Division, Second Department, adopted a more liberal view in *Catino v. Kirschbaum*<sup>508</sup> and sustained the qualifications items requested.<sup>509</sup> The Second Department concluded that the qualifications requirement "is not to preclude any possibility of identifying an adversary's medical expert."<sup>510</sup>

### B. Expert Medical Witnesses

In *Gilly v. City of New York*,<sup>511</sup> the Court of Appeals held that, within certain limits, an opponent can subpoena his adversary's expert who has prepared a report that is not helpful to the position of the party who retained him.<sup>512</sup> In *Gilly*, the defendant's doctor prepared a report helpful to the plaintiff.<sup>513</sup> After a copy of the report was sent to the plaintiff pursuant to Uniform Rule 202.17,<sup>514</sup> she sought to have the physician testify at trial.<sup>515</sup> The Court of Appeals, reversing the lower courts, held that the expert could be compelled to relate the "substance" of his report.<sup>516</sup> The Court focused on the fact that the doctor had reduced his report to writing, which implied that an expert who gave an oral report could not be forced to testify by the nonretaining party.<sup>517</sup>

### C. Disclosure in Aid of Arbitration

Courts may not generally order discovery in aid of arbitration.<sup>518</sup> In *Hendler & Murray, P.C. v. Lambert*,<sup>519</sup> however, the Ap-

Young, Jr. Health Ctr., 135 Misc. 2d 200, 514 N.Y.S.2d 872 (Sup. Ct., Albany Co. 1987).

506. See N.Y. CPLR 3103 (McKinney Supp. 1988).

507. See *Pizzi*, 127 A.D.2d at 340, 515 N.Y.S.2d at 343.

508. 129 A.D.2d 758, 514 N.Y.S.2d 751 (2d Dep't 1987)

509. See *Catino*, 129 A.D.2d at 759, 514 N.Y.S.2d at 752.

510. *Id.*

511. 69 N.Y.2d 509, 508 N.E.2d 901, 516 N.Y.S.2d 166 (1987).

512. See *Gilly*, 69 N.Y.2d at 510, 508 N.E.2d at 902, 516 N.Y.S.2d at 167.

513. See *id.* The expert in *Gilly* was a doctor hired by the defendant to determine whether plaintiff's angina was caused by the defendant. See *id.* The physician prepared a report favorable to the plaintiff, a copy of it was sent to the plaintiff pursuant to court rules, and the plaintiff sought to have the physician testify at trial. See *id.*

514. See MCKINNEY'S 1987 N.Y. RULES OF THE COURT § 202.17 (22 NYCRR 202.17).

515. See *Gilly*, 69 N.Y.2d at 509, 508 N.E.2d at 901, 516 N.Y.S.2d at 166.

516. See *id.* at 509, 508 N.E.2d at 902, 516 N.Y.S.2d at 167.

517. See *id.* at 512, 508 N.E.2d at 904, 516 N.Y.S.2d at 168.

518. See *Hendler & Murray v. Labert*, 127 A.D.2d 820, 511 N.Y.S.2d 941 (2d Dep't

pellate Division, Second Department, held that document discovery was authorized on the trial court's discretionary finding that the documents were "required to present a proper case to the arbitrator."<sup>520</sup> Absent extraordinary circumstances, it is unlikely that courts will permit examination before trial in an arbitration hearing. The decision in *Hendler* hints, however, that the gates may be opening.

#### D. FOIL Disclosure

In *M. Farbman & Sons, Inc. v. New York City Health & Hospitals Corp.*,<sup>521</sup> the Court of Appeals held that a party could use the Freedom of Information Act<sup>522</sup> to obtain materials not available through disclosure under the CPLR.<sup>523</sup> During the *Survey* year the Court of Appeals held in *Capital Newspapers v. Whalen*<sup>524</sup> that if a private document is among the records retained by a government agency, it is also subject to FOIL disclosure.<sup>525</sup> Thus, a document having nothing to do with a government function will not be exempt from FOIL requests if it is a "record," it is "kept" or "held" by an agency, and it is not otherwise subject to a specific exemption under the FOIL.<sup>526</sup>

#### E. Sanctions for Disclosure Abuses

Under CPLR 3126,<sup>527</sup> any party or person who refuses to obey

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1987) Courts may not order discovery in aid of arbitration unless the movant has demonstrated extraordinary circumstances. *See id.* at 821, 511 N.Y.S.2d at 942.

519. *See id.*

520. *Id.* (quoting *In re Moock v. Emmanuel*, 99 A.D.2d 1003, 473 N.Y.S.2d 793 (1st Dep't 1984)).

521. 62 N.Y.2d 75, 464 N.E.2d 437, 476 N.Y.S.2d 69 (1984).

522. *See Farbman*, 62 N.Y.2d at 77, 464 N.E.2d at 440, 476 N.Y.S.2d at 73 (citing N.Y. PUB. OFF. LAW §§ 91-99 (McKinney 1983)).

523. *See id.* at 78, 464 N.E.2d at 440, 476 N.Y.S.2d at 74. The Court of Appeals refuses: to read into the FOIL the restriction that, once litigation commences, a party forfeits the rights available to all other members of the public and is conferred to discovery in accordance with article 34. If the Legislature had intended to exempt agencies involved in litigation from FOIL, it certainly could have so provided. *Id.* at 77-78, 464 N.E.2d at 440, 62 N.Y.S.2d at 71-72.

524. 69 N.Y.2d 246, 505 N.E.2d 932, 513 N.Y.S.2d 367 (1987).

525. *See Capital Newspapers*, 69 N.Y.2d at 248, 505 N.E.2d at 936, 513 N.Y.S.2d at 368.

526. *See id.*

527. *See* N.Y. CPLR 3126 (McKinney 1987).

an order for disclosure or willfully fails to disclose information is subject to sanction.<sup>528</sup> Last year's *Survey* warned the practitioner that he should expect to be held accountable to strict compliance with CPLR 3126.<sup>529</sup> This year's decisions warrant the same message.<sup>530</sup> The appellate divisions have not been reluctant to dismiss complaints,<sup>531</sup> strike answers,<sup>532</sup> and impose monetary sanctions for failure to comply with disclosure orders.<sup>533</sup>

#### F. Article 31 Superseded by SCPA

In *Will of Devine*,<sup>534</sup> the Appellate Division, First Department, held that the Surrogate improperly required the parties in a probate proceeding to comply with provisions of article 31<sup>535</sup> when they sought to have the decedent's paper examined. The First Department held that the disclosure provisions of section 1412 of the Surrogates' Procedure Act,<sup>536</sup> which direct a preliminary executor to make all papers of a decedent available for examination and

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528. See *id.*

529. See Carlisle, *supra* note 7, at 120-21.

530. See *Corona v. A-B-C Packaging Mach. Corp.*, 129 A.D.2d 763, 514 N.Y.S.2d 756 (2d Dep't 1987); *Craigie v. Consolidated Edison Co.*, 127 A.D.2d 556, 511 N.Y.S.2d 359 (2d Dep't 1987); *Scharlack v. Richmond Mem. Hosp.*, 127 A.D.2d 580, 511 N.Y.S.2d 380 (2d Dep't 1987); *Simon v. Avis Rent-A-Car, Inc.*, 125 A.D.2d 583, 511 N.Y.S.2d 384 (2d Dep't 1987); *Carmen v. West Hudson Hosp.*, 129 A.D.2d 868, 514 N.Y.S.2d 137 (3d Dep't 1987); *Metflex Corp. v. Klafter*, 123 A.D.2d 845, 507 N.Y.S.2d 460 (2d Dep't 1986). But see *Dauria v. City of New York*, 127 A.D.2d 459, 511 N.Y.S.2d 271 (1st Dep't 1987) (reversing the supreme court's order striking the city's answer for failure to produce an employee who had personal knowledge of the area where the plaintiff fell where the City had made a good faith effort to comply with the disclosure request).

531. See *Scharlack v. Richmond Mem. Hosp.*, 127 A.D.2d 580, 511 N.Y.S.2d 380 (2d Dep't 1987) (complaint dismissed based on patient's nine-month unexcused failure to comply with discovery order). *Carmen v. West Hudson Hosp.*, 129 A.D.2d 868, 514 N.Y.S.2d 137 (3d Dep't 1987) (holding motion to dismiss should have been granted without condition where plaintiffs failed to file a timely note of issue, offered no acceptable excuse, and did not provide court with affidavit of merits of case).

532. See *Corona v. A-B-C Packaging Mach. Corp.*, 129 A.D.2d 763, 514 N.Y.S.2d 756 (2d Dep't 1987) (appellate division held trial court did not abuse its discretion to strike answer as sanction, although the sanction was severe).

533. See *Simon v. Avis Rent-A-Car, Inc.*, 125 A.D.2d 583, 511 N.Y.S.2d 384 (vacatur of automatic dismissal upon personal payment of \$500 by plaintiff's attorney); *Metflex Corp. v. Klafter*, 123 A.D.2d 845, 507 N.Y.S.2d 460 (2d Dep't 1986) (fine of \$1,500 imposed on party who disregarded several court disclosure orders).

534. 126 A.D.2d 491, 511 N.Y.S.2d 231 (1st Dep't 1987).

535. See *Devine*, 126 A.D.2d at 493, 511 N.Y.S.2d at 234 (citing N.Y. CPLR 3100-40 (McKinney Supp. 1988)).

536. N.Y. SCPA § 1412 (McKinney 1982).

copying, are inconsistent with and preempt article 31<sup>537</sup> to the extent that it requires papers to be specified with reasonable particularity and authorizes disclosure only after the filing of objections.<sup>538</sup> The court also held that the Surrogate erred in resorting to the legislative history of article 31 to interpret section 1412 of the SCPA.<sup>539</sup>

### G. Disclosure Against State

CPLR 3102(f)<sup>540</sup> now provides that in any state court action in which the state is properly a party, disclosure by the state will be available as if the state were a private litigant.<sup>541</sup> Moreover, a court order is no longer required in order to obtain disclosure from the state.<sup>542</sup> Requests for admissions and interrogatories are not available from the state.<sup>543</sup>

### H. Non-Party Document Discovery

Non-party document discovery is conducted in New York pursuant to CPLR 3120(b)<sup>543.1</sup> which requires that a court order be obtained authorizing discovery. In *Beiny v. Wynyard*,<sup>543.2</sup> the Appellate Division for the First Department held that documents obtained from a third party without proper notice under subsection (b) must be suppressed and disqualified the law firm which failed to follow the proper procedure under CPLR 3120.<sup>543.3</sup>

## VII. RES JUDICATA AND COLLATERAL ESTOPPEL

Last year's *Survey* highlighted recent developments in the doctrines of claim preclusion<sup>544</sup> and issue preclusion.<sup>545</sup> During

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537. See N.Y. CPLR 3100-40 (McKinney Supp. 1988).

538. See *Devine*, 126 A.D.2d at 493, 511 N.Y.S.2d at 233.

539. See *id.*; see also N.Y. SCPA § 1412 (McKinney 1982).

540. See N.Y. CPLR 3102(f) (McKinney Supp. 1987).

541. See *id.*

542. See *id.*

543. See *id.*

543.1 N.Y. CPLR 3120(b) (McKinney 1987).

543.2 133 A.D.2d 37, 517 N.Y.S.2d 474 (1st Dep't 1987).

543.3 See *Beiny*, 133 A.D.2d at —, 517 N.Y.S.2d at 478-80.

544. Under the doctrine of claim preclusion, a final judgment on the merits bars a subsequent action between the parties, or persons in privity with them, from relitigating the same cause of action. It bars the relitigation of claims which might have been litigated as well as those which actually were litigated. See *O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 429

1987, both doctrines were liberally applied in a variety of contexts.<sup>546</sup>

In *Henry Modell & Co. v. Minister, Elders & Deacons of the Reformed Protestant Church*,<sup>547</sup> the Court of Appeals held the doctrine of claim preclusion barred a sublessee's action based on a renewal option in the prime lease.<sup>548</sup> In the prior civil court action the landlord sought to recover possession and the plaintiff defended, in part, by asserting a right of possession arising from the renewal clause in its lease.<sup>549</sup> The Court held that the plaintiffs' claim was "really nothing more than a resuscitated assertion of a right to possession recast on terms of a new legal theory."<sup>550</sup> Since the claim could have been raised in the first action the Court concluded that "a party is not free to remain silent in an action in which he is the defendant and then bring a second action seeking

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N.E.2d 1158, 445 N.Y.S.2d 687 (1981); *Smith v. Russell Sage College*, 54 N.Y.2d 185, 429 N.E.2d 746, 445 N.Y.S.2d 68 (1981).

545. As the doctrine of issue preclusion now stands, a valid final judgment on the merits rendered by a court of competent jurisdiction prevents relitigation by the parties or their privies, of matters of fact or law actually litigated or necessarily determined, in the earlier action. Two prerequisites must be met to apply the doctrine in New York State courts. "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded . . . must have had a full and fair opportunity to contest the prior determination." *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 453, 482 N.E.2d 63, 66, 492 N.Y.S.2d 584, 588 (1985).

546. For examples of cases in which claim preclusion was applied, see, e.g., *Estate of Young v. Williams*, 810 F.2d 363 (2nd Cir. 1987) (prior action in which plaintiffs obtained injunctive relief barred personal injury action on claim preclusion grounds); *Kirkland v. City of Peekskill*, 651 F. Supp. 1225 (S.D.N.Y. 1987) (police commissioner's federal action barred by prior adverse determination by New York State Division of Human Rights); *Lawrence v. McGuire*, 651 F. Supp. 312 (S.D.N.Y. 1987) (prior state court judgment barred federal action); *Multi-Communications, Inc. v. United States*, 648 F. Supp. 1203 (S.D.N.Y. 1986) (prior decision of District of Columbia Court of Appeals barred second federal action); *Walentas v. Johnes*, 126 A.D.2d 417, 510 N.Y.S.2d 121 (1st Dep't 1987) (decision in prior action holding that tenant had a right to have roommate live with him in apartment barred landlord from denying existence of a valid landlord-tenant relationship in a subsequent counterclaim). See *infra* notes 547-52 and accompanying text. For examples of cases in which issue preclusion was applied, see, e.g., *United States v. Diamond*, 657 F. Supp. 1204 (S.D.N.Y. 1987) (a physician's criminal conviction barred relitigation of the same issues by him in civil action); *Samhammer v. Home Mutual Ins. Co.*, 120 A.D.2d 59, 507 N.Y.S.2d 499 (3d Dep't 1986) (hearing board determination precluded husband and nonparty wife from subsequent civil litigation). See *infra* note 576 and accompanying text.

547. 68 N.Y.2d 456, 502 N.E.2d 978, 510 N.Y.S.2d 63 (1986).

548. See *Henry Modell*, 68 N.Y.2d at 459, 502 N.E.2d at 980, 510 N.Y.S.2d at 67.

549. *Minister, Elders & Deacons of the Reformed Protestant Dutch Church v. 198 Broadway, Inc.*, 59 N.Y.2d 170, 451 N.E.2d 164, 464 N.Y.S.2d 406 (1983).

550. *Henry Modell*, 68 N.Y.2d at 459, 502 N.E.2d at 981, 510 N.Y.S.2d at 66.

relief inconsistent with the judgment in the first action by asserting what is simply a new legal theory.”<sup>551</sup>

In *Green v. Santa Fe Industries*,<sup>552</sup> the Court of Appeals refused to apply the doctrine of “res judicata” or “collateral estoppel”<sup>553</sup> when a similar action in federal court resulted in a dismissal on the merits.<sup>554</sup> The Court held that the prior dismissal did not involve the resolution of factual issues<sup>555</sup> and that the party against whom the doctrine was asserted was not in privity with the parties in the federal litigation.<sup>556</sup> However, in *People v. Acevedo*,<sup>557</sup> the Court of Appeals held that ultimate and evidentiary facts determined by an acquittal of the defendant in one criminal proceeding were entitled to preclusive effect against the People in a subsequent criminal proceeding against the same individual.<sup>558</sup> Acevedo had been charged with robbery in two separate incidents and was acquitted of the first charge.<sup>559</sup> In refusing to permit the alleged victim of the first robbery to testify to having seen the defendant the night of the incidents the Court stated that the “[d]efendant, having once been acquitted by a jury, should not at a subsequent trial be subjected to the burden of meeting issues that were already necessarily decided in his favor.”<sup>560</sup> The Court

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551. *Id.* at 458, 502 N.E.2d at 980, 510 N.Y.S.2d at 65.

552. 70 N.Y.2d 244, 514 N.E.2d 105, 519 N.Y.S.2d 793 (1981)

553. *Id.* Judge Hancock’s terminology notwithstanding, it should be noted that the New York State Court of Appeals has adopted the “claim preclusion” and “issue preclusion” terminology of section 68 of the the Restatement (Second) of Judgments. See *American Ins. Co. v. Messinger*, 43 N.Y.2d 184, 189 n.2, 371 N.E.2d 789, 792 n.2, 401 N.Y.S.2d 36, 39 n.2 (1977); see also Carlisle, *Getting a Full Bite of the Apple: When Should The Doctrine Of Issue Preclusion Make an Administrative Or Arbitral Determination Binding In A Court Of Law*, 55 FORDHAM L. REV. 63 (1986). “Consistent use of the terms ‘claim preclusion’ and ‘issue preclusion’ will help clarify the distinction between the two concepts in judicial opinions and will minimize the confusion created when ‘res judicata’ is used to describe both of them.” Carlisle, *supra*, at 65.

554. See *Green v. Santa Fe Indus.*, 576 F. Supp. 269, *aff’d*, 742 F.2d 1434, *cert. denied*, 469 U.S. 917 (1984).

555. See *Green*, 70 N.Y.2d at 246, 514 N.E.2d at 107, 519 N.Y.S.2d at 795 (issues regarding Martin Act not resolved in federal court action).

556. See *id.* at 247, 514 N.E.2d at 108, 519 N.Y.S. at 796. Because the privity issue involved questions of fact, summary judgment was improper. See *id.* at 248, 514 N.E.2d at 108, 519 N.Y.S. at 797.

557. 69 N.Y.2d 478, 508 N.E.2d 665, 515 N.Y.S.2d 753 (1987).

558. See *Acevedo*, 69 N.Y.2d at 486-87, 508 N.E.2d at 670-71, 515 N.Y.S.2d at 759.

559. See *id.* at 483, 508 N.E.2d at 668, 515 N.Y.S.2d at 757.

560. *Id.* at 485, 508 N.E.2d at 669, 515 N.Y.S.2d at 758.

distinguished *People v. Goodman*,<sup>561</sup> where it recently did not apply issue preclusion, on the grounds that it did not require going beyond the ultimate facts.<sup>562</sup> Furthermore, adoption of the evidentiary fact rule in *Goodman* would not have changed the result reached.<sup>563</sup>

Finally, the Appellate Division, First Department, refused to give res judicata (claim preclusion) effect to a prior federal court dismissal of a complaint for failure to state a cause of action.<sup>564</sup> The First Department rested its decision on the fact that, although the same transaction was involved in the federal and state actions, the federal court's dismissal was based solely on allegations of fraud and was therefore not on the merits.<sup>565</sup>

#### A. Administrative Determinations

In *Ryan v. New York Telephone Co.*<sup>566</sup> the Court of Appeals expanded the doctrine of issue preclusion to administrative determinations.<sup>567</sup> The *Ryan* case was strongly criticized by several commentators,<sup>568</sup> and during the *Survey* year the case was legislatively overruled by section 623 of the Labor Law.<sup>569</sup> That section provides that no finding of fact or law contained in a decision rendered on a claim for unemployment insurance may be given preclusive effect in subsequent litigation.<sup>570</sup> The limit is applicable when the initial decision is made by a court appeal board or referee.<sup>571</sup> It does not apply in a subsequent action which (1) itself arises under the unemployment insurance article of the Labor

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561. 69 N.Y.2d 32, 503 N.E.2d 996, 511 N.Y.S. 2d 565 (1986) (people not collaterally estopped from presenting evidence to a second jury).

562. See *Acevedo*, 69 N.Y.2d at 489, 508 N.E.2d at 669, 515 N.Y.S. 2d at 759.

563. See *id.* at 490, 508 N.E.2d at 670, 515 N.Y.S. 2d at 759.

564. *Evans v. L.F. Rothschild, Unterberg, Towbin, Inc.*, 131 A.D.2d 278, 520 N.Y.S.2d 940, (1st Dep't 1987).

565. See *id.* at 279, 520 N.Y.S.2d at 940.

566. 62 N.Y.2d 494, 467 N.E.2d 487, 478 N.Y.S.2d 823 (1984).

567. See *Ryan*, 62 N.Y.2d at 495, 467 N.E.2d at 489, 478 N.Y.S.2d at 825.

568. See *Carlisle*, *supra* note 553; see also *Dusovic v. New Jersey Transit Bus Operations, Inc.*, 124 A.D.2d 634, 508 N.Y.S.2d 26 (2d Dep't 1986) (a "reverse Ryan" fact pattern). *Dusovic* is a good illustration of the inherent unfairness of the Court of Appeals reasoning in *Ryan*.

569. See Act of July 7, 1987, ch. 258, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 387 (codified at N.Y. LAB. LAW § 623 (McKinney Supp. 1988)).

570. See *id.*

571. See *id.*

Law, (2) seeks to collect or challenge liability for unemployment insurance contributions, (3) seeks to recover overpayments of unemployment insurance coverage, or (4) alleges a denial of constitutional rights in connection with the determination of a claim for unemployment insurance benefits, or of liability for contributions.<sup>572</sup> Preclusive effect, therefore, may be given to these types of actions. The practitioner should be aware, however, that the broader principles for which *Ryan* stands are unchanged.<sup>573</sup>

### B. Arbitral Determinations

In *Clemens v. Apple*,<sup>574</sup> the Court of Appeals barred the plaintiff from relitigating the issue of whether his herniated disc condition was causally related to an automobile accident on the grounds that that issue had been previously determined against him at an arbitration proceeding before a Health Services Administration panel.<sup>575</sup> Several decisions during the *Survey* year expand the *Clemens* rationale.<sup>576</sup> In *Maldonado v. Nu Way Fuel Burner, Inc.*,<sup>577</sup> the plaintiff's assignee chose to arbitrate a denied health service claim.<sup>578</sup> After a hearing, the arbitrator concluded that the claimant assignee hospital had failed to meet its burden of demonstrating that the vehicle responsible for causing the accident belonged to the defendant.<sup>579</sup> The plaintiffs, who were not actual parties to the arbitration proceeding, then initiated a personal injury action against the defendant who moved to dismiss on the ground that the decision of the arbitrator found that its vehicle was not involved in the accident.<sup>580</sup> The Appellate Division for the Second Department held:

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572. *See id.*

573. *See supra* note 572 and accompanying text.

574. 65 N.Y.2d 746, 481 N.E.2d 560, 492 N.Y.S.2d 20 (1985).

575. *See Clemens*, 65 N.Y.2d at 748, 481 N.E.2d at 563, 492 N.Y.S.2d at 22.

576. *See generally* Shayne & Dachs, *Insurance and No-fault Law: Collateral Estoppel*, N.Y.L.J., July 14, 1987, at 1, col 1 (discussing expansion of *Clemens* rationale); Dachs & Dachs, *Insurance And No Fault Law: Recent Developments*, N.Y.L.J., Oct. 13, 1987, at 1, col. 1 (discussing how doctrine of issue preclusion is applied to arbitration awards). *See also* Page, *Res Judicata, Collateral Estoppel, Arbitration Awards*, N.Y.L.J., Jan. 14, 1988, at 1, col. 1.

577. 131 A.D.2d 735, 517 N.Y.S.2d 46 (2d Dep't 1987).

578. *See Maldonado*, 131 A.D.2d at 737, 517 N.Y.S.2d at 49.

579. *See id.* at 738, 517 N.Y.S.2d at 49.

580. *See id.*, 517 N.Y.S.2d at 50.



clearly any personal injury action on behalf of the plaintiffs against Nu Way (the vehicle owner) is barred by the previous arbitration between Mr. Maldonado's assignee and Nu Way's insurance carrier, as the hospital, with which the plaintiffs were in privity, had a full and fair opportunity to litigate the issue of the vehicle's identity in the prior forum.<sup>581</sup>

If the plaintiff's assignee had prevailed before the arbitrator, the result could not have been used affirmatively on his behalf because the defendant was not a party to the arbitration.<sup>582</sup>

Reference must also be made to *Taylor v. Ashby*.<sup>583</sup> The Appellate Division, Second Department, held that preclusive effect should be given to a New Jersey arbitration award.<sup>584</sup> Only the defendants had been parties to the prior arbitration.<sup>585</sup> The practitioner should also be alert of the Court of Appeals decision in *Claim of Guimaraes*,<sup>586</sup> where the Court held that the Appellate Division, Third Department, had erred in not giving preclusive effect to an arbitrator's factual findings regarding a claimant's conduct.<sup>587</sup>

The above *Survey* year decisions should cause the bench and bar to recognize that the typical justification for giving preclusive effect to arbitral determinations must have limited application in judicial proceedings.<sup>588</sup> Before applying the doctrine to arbitral findings, courts should permit the party seeking to avoid preclusion to show factors which can raise a rebuttable presumption that the nonjudicial determinations be denied preclusive effect.<sup>589</sup>

Although a decision to grant issue preclusion needs to be based on the specific circumstances of each case, such factors should include: (1) the existence of admissible evidence, unavailable at the previous hearing (because, for example, full disclosure was not available, tending to support the position of the party defending against preclusion); (2) a showing that the party defending against preclusion was denied the opportunity to present evidence

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581. *Id.* at 737, 517 N.Y.S.2d at 48.

582. *See id.* at 738, 517 N.Y.S.2d at 50.

583. 134 A.D.2d 248, 520 N.Y.S.2d 587 (2d Dep't 1987).

584. *See Taylor*, 134 A.D.2d at 250, 520 N.Y.S.2d at 588.

585. *See id.*, 520 N.Y.S.2d at 589.

586. 68 N.Y.2d 989, 503 N.E.2d 113, 510 N.Y.S.2d 558 (1986).

587. *See Guimaraes*, 68 N.Y.2d at 991, 503 N.E.2d at 116, 510 N.Y.S.2d at 560.

588. *See supra* note 572 and accompanying text.

589. *See id.*

and cross-examine witnesses, or that the effectiveness of such presentation and cross-examination was severally limited by the presiding officer at the nonjudicial forum or because the evidence was inadmissible under the rules of that forum; and (3) a showing that the party was not represented by an attorney in the previous action.

When this presumption is raised on the ground of the existence of new evidence, the party seeking to invoke preclusion may rebut by showing that the sum of the evidence, viewed in the light most favorable to the party defending against preclusion, could not support an alternate finding. Similarly, when the presumption is raised on the ground of a denial of the opportunity to present evidence and cross-examine witnesses, or the severe limitation of this opportunity, the party seeking to invoke preclusion must demonstrate that such opportunity would not have resulted in a different determination.

Finally, when the party defending against preclusion has raised this presumption by showing that he was not represented by an attorney, the party seeking preclusion may successfully rebut it in two ways. The first is by demonstrating that the defending party was fully aware of the possible preclusive effect of the earlier determination (such as by showing that the judicial action was commenced prior to the one in the nonjudicial forum) and that the party was afforded an opportunity to present evidence and cross-examine witnesses. The second is to demonstrate that the party had the opportunity to present evidence and cross-examine witnesses, and that the evidence on which the nonjudicial determination was based was sufficiently reliable to be termed a judicial action.

It does not follow that denying preclusive effect to arbitration awards will render these decisions meaningless. Arbitral findings may be admissible as evidence in subsequent court proceedings subject to the usual rules of evidence. This approach will permit many findings of fact to be used for impeachment purposes without resulting in the harsh results of *Maldonado* or in the mechanical application of the doctrine by the Court of Appeals in the *Claim of Guimaraes*.<sup>590</sup>

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590. See *supra* notes 577-86 and accompanying text.

## VIII. MISCELLANEOUS

During the *Survey* year some other decisions emerged that merit mentioning.

A. *Certificate of Merit in Medical Malpractice Actions*

The recent amendment to CPLR 3012-a<sup>591</sup> requires a certificate of merit as a prerequisite to filing a medical malpractice case.<sup>592</sup> The first decision rendered subsequent to the passage of CPLR 3012-a<sup>593</sup> was *Steinberg v. Brookdale Hospital Medical Center*.<sup>594</sup> The court held that the failure to file a certificate was not jurisdictional, and therefore did not mandate dismissal of the action where the certificate was subsequently served.<sup>595</sup> The plaintiff's late service of the certificate was therefore not fatal, and he was given leave to re-serve the complaint together with the requisite certificate within twenty days after service of the copy of the order.<sup>596</sup>

Under CPLR 3012-a<sup>597</sup> the practitioner should seek a qualified expert evaluation as soon as possible.<sup>598</sup> Failure to do so can lead to the imposition of sanctions under CPLR 8303(a).<sup>599</sup> Counsel should immediately obtain all pertinent hospital records including x-rays, prior medical records and reports, fetal monitoring strips, photographs and any other material that will familiarize the expert with the case. The next step would be to screen all potential candidates and select an expert who is competent and credible.<sup>600</sup>

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591. See Act of July 30, 1987, ch. 507, 1987 MCKINNEY'S SESS. LAWS OF N.Y. 855-56 (codified at N.Y. CPLR 3012-a (McKinney Supp. 1988)).

592. N.Y. CPLR 3012-a (McKinney Supp. 1988).

593. See *id.*

594. 134 Misc. 2d 268, 510 N.Y.S.2d 797 (Sup. Ct., King's Co. 1986); see also *Cirigliano v. De Perio*, 134 Misc. 2d 1065, 514 N.Y.S.2d 321 (Sup. Ct., Erie Co. 1987) (holding it would be inappropriate to consider the certificate a "nullity" as the court did in the *Steinberg* case).

595. See *Steinberg*, 134 Misc. 2d at 268, 510 N.Y.S.2d at 797.

596. See *id.* at 271, 510 N.Y.S.2d at 801.

597. N.Y. CPLR 3012-a (McKinney Supp. 1988).

598. See *id.*

599. See N.Y. CPLR 8303(a) (McKinney Supp. 1988)

600. See *Stone, Choosing The Right Medical Expert For Your Malpractice Case*, N.Y.S.T.L.A. Bill of Particulars, Sept-Oct. 1987, at 6, col.1.

*B. Emotional Distress: A New Cause of Action?*

In *Martinez v. Long Island Jewish Hospital*,<sup>601</sup> the Court of Appeals created a new cause of action in tort for the recovery of damages for emotional distress derived from a persons subjective feeling of guilt following the negligently given advice of a physician.<sup>602</sup> The holding is limited, however, by the Court of Appeals' explicit classification of this case as one involving unusual circumstances.<sup>603</sup> The practitioner should still be prepared to inform and advise clients with respect to a possible claim under the *Martinez* rationale.<sup>604</sup> The practitioner should also be aware of an emerging area of products safety law which encourages plaintiffs to seek compensation for the mental anguish and anxiety arising from the fear of contracting cancer in the future.<sup>605</sup> The majority of cancerphobia claims have arisen in asbestos and DES claims.<sup>606</sup>

*C. Collateral Source Rule*

CPLR 4545<sup>607</sup> limits the recovery of certain damages when a plaintiff will be collaterally reimbursed for them.<sup>608</sup> The first *Survey* year decision to apply newly added subdivision (c) of CPLR 4545 was *Budano v. Messina*,<sup>609</sup> where the Supreme Court of New York County eliminated most of a jury's award of \$151,000 for loss of past and future earnings because of collateral benefits available to the plaintiff in the form of social security benefits.<sup>610</sup> The

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601. 70 N.Y.2d 697, 512 N.E.2d 538, 518 N.Y.S.2d 955 (1987).

602. See *Martinez*, 70 N.Y.2d at 700, 512 N.E.2d at 539, 518 N.Y.S.2d at 956 (Titone, J., dissenting).

603. See *id.* at 699, 512 N.E.2d at 538-39, 523 N.Y.S.2d at 956.

604. See Connors, *Pandora's Box Opened in Expansion of Recovery for Emotional Distress*, 197 N.Y.L.J., Aug. 4, 1987, at 1, col. 1 (historical analysis of recovery for emotional distress).

605. See Mayesh & Rome, *Compensation for Cancerphobia: The Return of High Anxiety*, 198 N.Y.L.J., Oct. 27, 1987, at 1, col. 1 (discussing trends in other jurisdictions and predicting new issue for New York Courts).

606. See *id.*

607. See N.Y. CPLR § 4545 (McKinney 1986)).

608. See *id.* § 4545. The amendment added subdivision (c) which is applicable to personal injury, property damage, or wrongful death actions where a plaintiff seeks to recover for the cost of medical care, custodial care, rehabilitation services, loss of earnings, or other economic loss. See *id.* § 4545(c). Here, collateral-source evidence is available to mitigate damages; however, the rule does not apply to life insurance. See *id.*

609. 197 N.Y.L.J., June 8, 1987, at 19, col. 2. (Sup. Ct., N.Y. Co.).

610. See *id.*

*Budano* case has been sharply criticized by several prominent commentators.<sup>611</sup> *Budano*, however, is an important example of trial strategy.<sup>612</sup> Should reference to collateral source payments and the court's obligation to reduce the verdict after trial be raised and included in the jury instructions? In *Budano* none of the parties requested such an instruction and none was given.<sup>613</sup>

#### D. Periodic Payment of Awards

Article 50-B became effective on July 30, 1986.<sup>614</sup> It requires that the jury be asked to render a verdict itemizing damages between past special, past general, future special, and future general damages.<sup>615</sup> The first *Survey* year appellate decision to apply article 50-B was *Cabreja v. New York City Health & Hospitals Corp.*<sup>616</sup> The Appellate Division, First Department, held that because the Article was passed after the commencement of a medical malpractice action, but prior to the scheduled examination of an infant, recovery of damages in excess of \$250,000 may be paid on a periodic basis, rather than in a single lump sum.<sup>617</sup>

#### E. Moving for Leave to Appeal in the Court of Appeals

In 1986, the right of appeal to the Court of Appeals was limited and the need to move for leave expanded.<sup>618</sup> In *Quain v. Buzetta Construction Corp.*,<sup>619</sup> the Court of Appeals struck portions of a defendant appellant's jurisdictional statement and brief that sought to raise issues not included in its motion to leave.<sup>620</sup> The Court stated:

[O]rdinarily when the court grants a motion for leave to appeal all issues of which the court may take cognizance may be addressed by the parties. Where, however, the party seeking leave

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611. See Kramer & Kramer, *Medical Malpractice*, 197 N.Y.L.J., Aug. 28, 1987, at 1, col. 1.

612. See *Budano*, 197 N.Y.L.J., June 8, 1987, at 20, col. 2 (Sup. Ct., N.Y. Co.)

613. See *id.*

614. See Act of July 30, 1986, ch. 682, 1986 MCKINNEY'S SESS. LAWS OF N.Y. 1565 (codified at N.Y. CPLR 5041 (McKinney Supp. 1988)).

615. See *id.*

616. 129 A.D.2d 516, 514 N.Y.S.2d 368 (1st Dep't 1987).

617. See *Cabreja*, 129 A.D.2d at 518, 514 N.Y.S.2d at 371.

618. See Carlisle, *supra* note 7, at 82-83.

619. 69 N.Y.2d 376, 507 N.E.2d 294, 514 N.Y.S.2d 701 (1987).

620. See *Quain*, 69 N.Y.2d at 379, 507 N.E.2d at 296, 514 N.Y.S.2d at 704.

specifically limits the issues to be raised, it is bound thereby and may not thereafter raise other questions.<sup>621</sup>

The practitioner, therefore, should be careful to seek leave to appeal on all issues. Frivolous or unimportant issues, however, which are usually good bets for denial, should not be included in the leave.

#### IX. CONCLUSION

Your author is grateful for the helpful comments and suggestions made by many members of the bench and bar. Positive comments from Daniel Kramer, Esq., Judge Weinfeld and Judge McLaughlin of the United States District Courts for the Southern and Eastern Districts, Justice Green from the Fourth Department, and Justice Rubin and Presiding Justice Mollen from the Second Department are appreciated more than they can imagine.

Special acknowledgment is also due, in alphabetical order to Professor Oscar O. Chase, Professor Richard T. Farrel, and Professor David D. Siegel. Each has generously welcomed and guided a new guy to the New York Civil Practice block.

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621. *Id.* at 402, 507 N.E.2d at 317, 514 N.Y.S.2d at 724.

## APPENDIX A

## TABLE OF NEW CPLR AMENDMENTS

<u>CPLR SECTION</u>	<u>EFFECTIVE DATE</u>
§ 211	8-7-87
Added new subd. (e), making a twenty year limitation period applicable to actions or proceedings to enforce orders or judgments awarding support, alimony or maintenance.	
§ 214-b	6-29-87
Amended to extend applicability of statute to "Agent Orange" actions commenced not later than 6-16-88.	
§ 308(2)(4)	7-15-87
Amended to provide alternative means of satisfying mailing requirements of substituted service and "nail and mail" procedures.	
§ 312	6-8-87
Amended to add provision that personal service upon a board or commission of a town or village may also be made by delivering the summons to the clerk of the town or village.	
§ 318	11-5-87
Amended to provide that a writing designating an agent for service be "executed and acknowledged in the same manner as a deed."	
§ 321(a)	1-1-88
Amended to make rule that a corporation or voluntary association shall appear by an attorney; subject to "sections 501 and 1809" of the uniform justice court act.	
§ 1108(a)	10-18-87
Amended to add requirement that an appellate court to which a motion for leave to appeal as a poor person has been or will be taken. Shall hear such motion on the merits.	
§ 3013-a	7-30-87
Amended to apply to podiatric malpractice actions.	

§ 3045

7-30-87

Amended to apply to podiatric malpractice actions.

§ 4546

7-30-87

Amended to apply to podiatric malpractice actions.

§ 5205(c)

6-8-87

Amended to revise definition of trust for purposes of property for exemption.

§ 5231

8-7-87

Amended to redefine amounts that may be subject to an income execution and to require that the execution contain a statement, as set out in subd. (g), advising the debtor of limitations on the amounts that may be deducted, and of the procedures for challenging such executions.

§ 5241(e)

8-7-87

Amended to provide that determinations of mistake of fact applications objecting to income executions issued by the sheriff of the clerk of the court, be made by the court rather than the issuer, to provide that applications to the Family Court be made to the court having jurisdiction under FCA 461 and that such applications be by petition on notice to creditor, and to specify procedure for applications made to the Supreme Court.

§ 5242

8-7-87

New subd. (e) added to provide that a creditor is not required to issue process under CPLR 5241 prior to obtaining relief under CPLR 5242.

§ 7804(i)

7-23-87

Make provision relating to appearance by judicial officer applicable to proceedings brought by a party to a pending action or proceeding, and eliminating requirement that proceedings be brought by a party to a pending criminal action or to a proceeding involving the custody of a child.

§ 8011(a)

9-1-87

Amended to increase amounts of certain fixed fees of sheriffs in



counties within the City of New York.

§ 8018(d)

9-1-87

Amended to increase from ten dollars to fifteen dollars, the mileage fee of the sheriff of the city of New York for mileage traveled within such city.

§ 8018(a)

11-5-87

Amended to increase from thirty-five dollars to one hundred dollars the fee to a county clerk for the assignment of an index number.

§ 8020(a)

11-5-87

Amended to clarify language related to the payment of fee of seventy dollars to a county clerk for placing a cause on a calendar for trial or inquest, and added an exception which authorizes a fee of fifty dollars where the rules of the chief administrator of the courts require that a request for judicial intervention be made in a pending action.

§ 8022

11-5-87

New section added entitled "Fee on civil appeal."

## APPENDIX B

## NEW COURT FEES AS OF NOVEMBER 5, 1987

<u>STATUTE</u>	<u>DESCRIPTION OF FEE</u>	<u>OLD FEE</u>	<u>NEW FEE</u>
CPLR 8018(a)	Index Number	\$35	\$100
CPLR 8020(a)	RJI	---	\$50
	Note of Issue	\$70	---
CPLR 8020(c)	Jury Demand*	\$50	\$50
CPLR 8022	Civil Appeal	---	\$200
SPCA 2402(5)	Recording	\$3/pg	\$4/pg
SPCA 2402(8)	Values:		
	Less than \$10,000	\$20	\$27
	\$10,000 to \$20,000	\$35	\$47
	\$20,000 to \$50,000	\$100	\$133
	\$50,000 to \$100,000	\$135	\$180
	\$100,000 to \$250,000	\$200	\$267
	\$250,000 to \$500,000	\$300	\$400
	Over \$500,000	\$600	\$800
SPCA 2402(9)(a)	Filing Fees:		
	SPCA 607	\$15	\$20
	SPCA 711 (Fiduciary)	\$35	\$47
	SPCA 711 (Customer to Guarantee)	\$15	\$20
	SPCA 715	\$15	\$20
	SPCA 717	\$15	\$20
	SPCA 1401	\$7	\$9
	SPCA 1420	\$35	\$40
	SPCA 1421	\$35	\$47
	SPCA 1502	\$20	\$27
	SPCA 1508	\$20	\$29
	SPCA 1703	\$7	\$9
	SPCA 2003	\$7	\$9
	SPCA 2102	\$7	\$9
	SPCA 2103	\$35	\$47
	SPCA 2107	\$35	\$47
	SPCA 2108	\$20	\$27
	SPCA 2205	\$15	\$20
	EPTL 7-4.6	\$7	\$9
SPCA 2402(10)(i)	Demand for Jury Trial	\$70	\$93
SPCA 2402(10)(ii)	Objections to Probate	\$70	\$93
SPCA 2402(10)(iii)	Note of Issue	\$20	\$27
SPCA 2402(10)(iv)	Objection to Answer	\$35	\$47
SPCA 2402(10)(v)	Will for Safekeeping	\$20	\$27

SPCA 2402(10)(vi)	Bond:		
	Less than \$10,000	\$7	\$9
	Over \$10,000	\$15	\$20
SPCA 2402(11)	Transcript	\$7	\$9
SPCA 2402(12)	Certificate of Letters	\$2	\$3
SPCA 2402(13)(a)	Certifying Will	\$3/pg	\$4/pg
SPCA 2402(13)(b)	Authenticating Will	\$7	\$9
SPCA 2402(14)	Searching and Certifying Records:		
	Under 25 years	\$15	\$20
	Over 25 years	\$40	\$53
SPCA 2402(15)(a)	Producing Paper	\$15	\$20
SPCA 2402(15)(b)	Messenger Fee	\$.15	\$.20
SPCA 2402(16)(a)	Recording	\$4/pg w/ \$8 min.	\$5/pg w/ \$10 min.
SPCA 2402(16)(b)	Foreign Will	\$4/pg w/ \$30 min.	\$5/pg w/ \$40 min.
SPCA 2402(16)(c)	Taxing Bill of Costs	\$4	\$5
NYCCCA 1911(a); UDCA 1911(a)(1); UCCA 1911(a)(2)	Issuance of Summons, etc.	\$20	\$25
NYCCCA 1911(b); UDCA 1911(a)(2); UCCA 1911(a)(1)	Filing	\$20	\$25
NYCCCA 1911(c); UCCA 1911(a)(3)	Infant's Compromise	\$20	\$25
NYCCCA 1911(d); UDCA 1911(a)(9); UCCA 1911(a)(4)	Notice of Trial	\$20	\$25
NYCCCA 1911(e); UDCA 1911(a)(3); UCCA 1911(a)(5)	Judgment upon Confession	\$20	\$25
NYCCCA 1911(f); UDCA 1911(a)(4); UCCA 1911(a)(6)	Notice of Appeal	\$15	\$19
NYCCCA 1911(g); UDCA 1911(a)(5); UCCA 1911(a)(7)	Satisfaction of Judgment	\$3	\$4
NYCCCA 1911(h); UDCA 1911(a)(6); UCCA 1911(a)(8)	Demand for Jury Trial	\$35	\$44
NYCCCA 1911(i); UDCA 1911(a)(7); UCCA 1911(a)(9)	Exemplification	\$6	\$8

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NYCCCA 1911(j); UDCA 1911(a)(8) UCCA 1911(a)(10)	Certification	\$3	\$4
NYCCCA 1911(k); UCCA 1911(a)(11)	Notice of Petition	\$20	\$25
NYCCCA 1911(l)	Name Change	\$30	\$38